Supreme Court, U. S.
FILED
JAN 22 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

JURISDICTIONAL STATEMENT

PAUL L. DOUGLAS
Attorney General of Nebraska

MELVIN KENT KAMMERLOHR
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Appellants

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

	Pages
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	5
Statement of the Case	5
Reasons Requiring Plenary Consideration	7
If Process Is Due, What Steps Are Required?	11
Other Substantial Considerations	11
Appendix, Ex. A	App. 1
Appendix, Ex. B	App. 3
Appendix, Ex. C	App. 17
Appendix, Ex. D	App. 18
Appendix, Ex. E	App. 20
Appendix, Ex. F	App. 25
Appendix, Ex. G	App. 27
Appendix, Ex. H	App. 31

CASES CITED

Gagnon v. Scarpelli, 411 U. S. 778, 36 L. Ed. 2d 656, 93 St. Ct. 1756 ..... 10, 11, 12

Meachum v. Fano, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 ..... 7, 9, App. 6, 7, 8

Montanye v. Haymes, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 ..... 7, 8, 10, App. 7, 9

CASES CITED—Continued

Pages

Morrissey v. Brewer, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 ..... 10, 11, 12, App. 8, 10, 16

Wolff v. McDonnell, 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 ..... 10, 11, 12, App. 9, 11, 12, 16

Vitek v. Miller, 436 U. S. 407, 98 S. Ct. 2276, 56 L. Ed. 2d 381 ..... 3, 7, App. 19

STATUTES CITED

28 U. S. C. § 1253 ..... 3, App. 26

28 U. S. C. § 1343 (3) and (4) ..... 2, App. 4

28 U. S. C. § 2201 ..... 2, App. 4

28 U. S. C. § 2202 ..... 2, App. 4

28 U. S. C. § 2281 ..... 2, App. 26

42 U. S. C. § 1983 ..... 2, App. 4

Public Law 94-381, Sec. 2, 90 Stat. 1119 2

Neb. Rev. Stat. § 83-173 (Reissue 1976) ..... 7, App. 20, 27

Neb. Rev. Stat. § 83-176 (Reissue 1976) ..... 7, 8, App. 16

Neb. Rev. Stat. § 83-179 (Reissue 1976) ..... 8, App. 15

Neb. Rev. Stat. § 83-180 (Reissue 1976) ..... 2, 3, 6, 9, App. 4, 12, 13, 19, 20, 22, 24

CONSTITUTION CITED

Constitution of the United States, Fourteenth Amendment ..... 5, App. 6

In The

Supreme Court of the United States

October Term 1978

—o—

No. .....

—o—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—o—

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

—o—

JURISDICTIONAL STATEMENT

—o—

Appellants appeal from the judgment of a three-judge court of the United States District Court for the District of Nebraska entered on October 27, 1978, declaring a statute of the State of Nebraska to be unconstitutional and enjoining the State of Nebraska as hereinafter set forth.

—o—

OPINION BELOW

The judgment previously appealed from of the United States District Court for the District of Nebraska dated October 14, 1977, which is reported at 437 F. Supp. 569, a Memorandum of Decision and Order, both dated September 12, 1977, supporting said judgment, the judgment presently appealed from entered October 27, 1978 reaffirming the foregoing judgment and a Memorandum of Decision Regarding Mootness filed October 27, 1978, which are unreported, are all annexed hereto as Exhibits A-E, respectively.

—o—

JURISDICTION

This is a civil rights action brought pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343(3) and (4), and 28 U.S.C. §§2201 and 2202 declaratory relief that Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) is unconstitutional under the Fourteenth Amendment to the Constitution of the United States and attendant injunctive relief.

A three-judge district court was convened below pursuant to 28 U.S.C. §2281, which was repealed by Public Law 94-381, Sec. 2, 90 Stat. 1119 but which repeal was not applicable to any action commenced on or before August 12, 1976. The present action was commenced on November 12, 1975.

On October 14, 1977, pursuant to a Memorandum of Decision and Order entered on September 12, 1977, the district court entered a final judgment which was sought to be reviewed herein.

Probable jurisdiction was noted by this Court on February 21, 1978 and oral argument was had in this Court on April 24, 1978.

On May 23, 1978 this Court vacated the judgment entered October 14, 1977 and remanded the case to the District Court for consideration of the question of mootness (*Vitek v. Miller*, 436 U. S. 407, 98 S. Ct. 2276, 56 L. Ed. 2d 381.)

On October 27, 1978 the District Court entered a Memorandum of Decision that the case was not moot and re-entered the same judgment as the one previously vacated. A Notice of Appeal therefrom was filed November 21, 1978 in the United States District Court for the District of Nebraska (App. Ex. F).

Jurisdiction to review by direct appeal the judgment of the United States District Court is conferred by 28 U.S.C. §1253.

Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) found in Volume 5, page 1112 of the official edition of the Nebraska Revised Statutes, which the United States District Court found to be unconstitutional, provides as follows:

> "(1) When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of

the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

"(2) When the physician or psychologist designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in, such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Department of Correctional Services, and shall be returned to the department when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

"(3) When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric

facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect."

A copy of the Notice of Appeal herein is set forth in the Appendix as Exhibit F.

QUESTIONS PRESENTED

1. Whether a constitutionally convicted felon who has been sentenced to the Nebraska Department of Correctional Services has any process due prior to his transfer from the penitentiary, to which he has been assigned within said department, to a mental hospital within the Department of Public Institutions of the State of Nebraska, when confinement in said hospital is within the sentence imposed upon him?

2. If process is due under question 1, what procedures are required by the Fourteenth Amendment of the United States Constitution in these circumstances?

STATEMENT OF THE CASE

Plaintiff-Intervenor, Larry D. Jones (appellee), was duly convicted of the crime of robbery under Nebraska law in the District Court of Douglas County, Nebraska, and was sentenced to the Department of Correctional Services for a term of three to nine years and com-

menced serving said term at the Nebraska Penal and Correctional Complex, a division of the Department of Correctional Services, on or about May 31, 1974 (R. 73). In April of 1975 said Larry D. Jones was involuntarily transferred to the Lincoln Regional Center Security Building, a facility of a state mental hospital operated by the Department of Public Institutions of the State of Nebraska. While in said mental hospital, the inmate remains subject to the jurisdiction and custody of the Department of Correctional Services.

The maximum sentence of appellee, Larry D. Jones, will not expire until May 30, 1983, subjecting him to the custody of the Department of Correctional Services until the expiration of said sentence. William George Foote and Charles Miller (appellees) have both received their final discharge after having served their maximum sentences and were no longer subject to the custody of the State of Nebraska prior to the entry of the Memorandum of Decision and judgment herein (Appendix Exs. A & B) and the case is moot as to them.

Said Larry D. Jones was transferred to the mental hospital, as above described, in accordance and compliance with the provisions of section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976), set forth above. He subsequently intervened in the present case, alleging that the foregoing statute was unconstitutional on its face and as applied by defendants and that this transfer to the said mental hospital was not within procedural due process requirements. Most of the evidence was stipulated or otherwise uncontested.

On November 17, 1977 while this case was on appeal to the U. S. Supreme Court the first time, Larry D. Jones

was granted a limited parole to receive in-patient treatment at a V. A. hospital in Danville, Ill. In light of this the U. S. Supreme Court remanded the case to the U. S. District Court for consideration of the question of mootness. (*Vitek v. Miller,* 436 U. S. 407, 98 S. Ct. 2276, 56 L. Ed. 2d 381.) On October 27, 1978, the three judge district court found the case was not moot (Appendix A). Larry D. Jones is now back in the confines of the Nebraska Penal and Correctional Complex having been arrested in Arizona in November 1978, on a Parole Board Warrant issued October 4, 1978. His parole was revoked by the Nebraska Parole Board after a final hearing on January 8, 1979 (App. Ex. H).

—o—

REASONS REQUIRING PLENARY CONSIDERATION

The conclusion by the court that process was due these prison inmates for transfer from one institution to another authorized by the sentence imposed appears to be contrary to the recent cases of this court of *Meachum v. Fano,* 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532, and *Montanye v. Haymes,* 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543. Briefly, the statutory system of the State of Nebraska for the custody of persons convicted of felonies provides, in addition to the statute above set forth, that: (1) The Director of the Department of Correctional Services shall designate the place of confinement of persons committed to the department (subject to the provisions of section 83-176—not applicable here) (83-173, Neb. Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. G); (2)

whenever a person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Service or to the custody of the warden, he shall be deemed to be sentenced to the department. The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another (83-176, Neb. Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. G); (3) upon his initial admission to the facility each person committed to the department shall be given a thorough evaluation including physical, psychological, social, educational and vocational. A report shall be made including recommendations regarding the facility to which such person should be assigned and the program of treatment for his rehabilitation, including medical and psychological treatment (83-179, Neb. Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. G).

This court has already recognized that transfer within the state system contemplated by the criminal sentence does not give rise to a procedural due process right—that was accomplished in the criminal conviction.

In *Montanye v. Haymes, supra,* this Court stated in part:

> "We also agree with the State of New York that under the law of that State Haymes had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct. Under New York law, adult persons sentenced to imprisonment are not sentenced to particular institutions, but are committed

> to the custody of the Commissioner of Corrections. He receives adult, male felons at a maximum-security reception center for initial evaluation and then transfers them to specified institutions. NY Correct Law § 71(1) (Supp. 1975-1976); 7 NYCRR § 103.10. Thereafter, the Commissioner is empowered by statute to 'transfer inmates from one correctional facility to another.' NY Correc. Law § 23(1) (Supp. 1975-1976). . . . "

The same is true as to *Meachum v. Fano supra.*

In the present case the district court recognized that the Supreme Court held in those cases that there was no due process clause liberty interest in such transfers unless there was some right or justifiable expectation rooted in State law that the inmate would *not* be transferred. It then attempts to distinguish the present case by stating that:

> " . . . [T]here was an objective expectation, firmly fixed in state law and official Penal Complex practice, that a transfer would not occur except when the inmate suffers from mental disease or defect and that it cannot be adequately treated at the Penal Complex. . . . "

The foregoing quote by the district court is a misreading of section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976), held by said court to be unconstitutional. That statute does not give the inmate an objective expectation that a transfer would not occur as stated by the district court above, but clearly gives him an expectation that he may be transferred if the physician or psychologist finds that he suffers from a mental disease or defect and is of the opinion that the person cannot be given proper treatment in the facility in which he is in. In the light of the

positive wording of this statute, together with the other state statutes mentioned above (Appendix, Ex. G), there is no objective expectation fixed in state law that a person, after classification, will remain in any one institution.

Neither is due process triggered as it was in *Morrissey v. Brewer,* 408 U.S. 471 (parole), *Gagnon v. Scarpelli,* 411 U.S. 778 (probation), or *Wolff v. McDonnell,* 418 U.S. 539 (good time), all of which were based upon the taking away of a positive grant affirmatively conferred by state law.

This Court further stated in *Montayne v. Haymes,* 427 U.S. 236 at 242:

> " . . . As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. . . . "

In the present case the district court put great reliance upon its findings that transfer to a mental hospital carried stigmatizing consequences, behavior modification, etc. amounting to a "grievous loss" citing *Wolff v. McDonnell and Morrissey v. Brewer, supra.* These considerations would seem to be irrelevant where the transfer is within the sentence imposed and not otherwise violative of the Constitution. (There was no challenge or finding that the conditions in the hospital or other areas within or without the Penal Complex where inmates may be transferred were violative of the Constitution.)

IF PROCESS IS DUE WHAT STEPS ARE REQUIRED?

The three-judge district court not only held that all of the requirements of *Morrissey v. Brewer, supra, Gagnon v. Scarpelli, supra,* and *Wolff v. McDonnell, supra,* must be followed but also added the requirement that legal counsel, furnished by the state, if the inmate is financially unable to furnish his own, must be made available. This, in spite of the fact that this Court considered but refused to make a requirement of legal counsel in all three of the above cases (Memorandum of Decision, App. pp. 12 and 13, Appendix, Ex. B).

OTHER SUBSTANTIAL CONSIDERATIONS

The three-judge court rendering the judgment in the present case consisted of two of the three district judges for the District of Nebraska and a judge from the United States Court of Appeals for the Eighth Circuit. If this judgment is permitted to stand, the officials of the Department of Correctional Services and the Department of Public Institutions will be constrained to follow its burdensome procedures, not only in every case of a transfer of a prison inmate to a mental hospital, but also in transfer of other inmates to facilities outside the Department of Corrections under the threat or fear of forfeiting their qualified immunity (thus encouraging actions for damages) for knowing failure to follow this precedent in the district.

Obviously, if they cannot transfer Larry D. Jones, appellee, while he is in custody, they cannot, without such procedure, transfer any other prison inmate for similar treatment or rehabilitation.

This Court has already pointed out the problems to a requirement of counsel, equally apropos here, in *Morrisey Scarpelli,* and *Wolff, supra.*

Respectfully submitted,

PAUL L. DOUGLAS
Attorney General of the State of Nebraska

MELVIN KENT KAMMERLOHR
Assistant Attorney General

Members of the Bar of the
Supreme Court of the United States

2115 State Capitol Building
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Appellants

APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE, WILLIAM McKINLEY HINES, and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., indivdually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

(Filed October 14, 1977)

JUDGMENT

Dept. of Justice, September 13, 1977, State of Nebraska

Pursuant to the memorandum of decision of September 12, 1977, filing 57, and the proposals for release subsequently submitted by the parties,

IT HEREBY IS ADJUDGED AND DECREED:

1. That § 83-180 (1), Nebraska R. R. S. 1943, is declared to be unconstitutional as applied to the

plaintiffs in that it denied the plaintiffs due process of law;

2. That this lawsuit is moot as to the plaintiff Charles Miller and as to the plaintiff-intervenor William George Foote and the action is therefore dismissed as to them; and

3. That the defendants are enjoined from transferring the plaintiff-intervenor Larry D. Jones, at any time before his complete discharge from the custody of the State of Nebraska on the criminal sentence which he is now serving, from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except by a procedure which includes each of the following:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights.

Dated October 14, 1977.

By the Court:

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE, WILLIAM McKINLEY HINES, and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, in-

dividually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMAN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

(Filed September 12, 1977)

MEMORANDUM OF DECISION

Dept. of Justice, September 13, 1977, State of Nebraska

APPEARANCES: For plaintiff and plaintiffs-intervenors, Thomas A. Wurtz

For defendants,

Mel Kammerlohr, Assistant Attorney General

Four[1] men who have been transferred involuntarily from the Nebraska Penal and Correctional Complex to the Security Unit of the Lincoln Regional Center because of claimed mental disease or defect challenge the constitutionality of the state statute under which they were transferred.

The action is brought pursuant to 42 U. S. C. § 1983 and jurisdiction is granted by 28 U. S. C. §§ 1343 (3) and (4), as well as 28 U. S. C. §§ 2201 and 2202, which authorize declaratory and injunctive relief.

Under attack is § 83-180, R. R. S. Neb. 1943[2], which provides:

> ". . . [W]hen a physician or psychologist designated by the [Director of Correctional Services] finds that a person committed to the [Department of Correctional Services] suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility.

> If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the Department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary."

Much of the evidence was stipulated or otherwise uncontested. Each of the plaintiffs was separately convicted for violations of Nebraska criminal law and sentenced to the Department of Correctional Services to a term of years. Each plaintiff began serving his term in the Nebraska Penal and Correctional Complex, which is within the Department of Correctional Services, but was involuntarily[3] transferred to the Lincoln Regional Center, which is not within the Department of Correctional Services but is within the Department of Public Institutions. Each was transferred without any formal notice or hearing or any safeguard other than determinations by one or more psychiatrists that the prisoner suffered from a mental disease or defect and that he could not be given proper treatment in the Nebraska Penal and Correctional Complex.

Inmates at the Penal Complex are provided access to certain psychiatric care and treatment, but the institution does not have a staff and facilities necessary to provide for all mental health needs which may arise. It does have a psychiatric care unit, which can be used as living quarters for inmates whose conditions require that they

be separated from the general population, and a hospital, where more closely guarded and segregated conditions may be imposed. Inmates within the psychiatric care unit or the prison hospital are subjected to a schedule more restrictive than that of the general prison population, but are not required to undergo psychiatric treatment involuntarily.

The Security Unit of the Lincoln Regional Center is a hospital, owned and operated by the State of Nebraska for the purpose of treatment of emotional and mental disorders. Patients there, including inmates transferred from the Penal Complex, are frequently required to participate in behavior modification programs and to take whatever medication may be prescribed for them. Confinement conditions are substantially more restrictive than those at the Penal Complex in that the patients have less freedom of movement, are under constant supervision, have substantially fewer recreational and vocational opportunities, are unable to earn money, and must spend most of their time in their wards. When the Lincoln Regional Center determines that an inmate no longer needs to remain at the Lincoln Regional Center, arrangements are made to return the prisoner to the Penal Complex.

I.

The Fourteenth Amendment to the Constitution of the United States forbids any State to "deprive any person of . . . liberty . . . without due process of law." When a person already has lost much of his liberty because he is imprisoned, not every change of status while he is imprisoned amounts to a loss of "liberty" within the meaning of the Constitution. The opinions in *Meachum v.*

Fano, 427 U. S. 215 (1976), and *Montayne v. Haymes,* 427 U. S. 236 (1976), are to the effect that it is not merely the gravity of the disadvantage imposed upon the prisoner by changes of location that determines whether the liberty interest is entitled to the protection of due process. The court in *Montayne* said at page 242:

> "We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events."

The plaintiffs here were not transferred from one "prison" to another but from a prison to a state mental hospital for both a continuation of their prison terms and for mental treatment. The prison and the hospital properly may be equated for due process purposes.[4] The evidence shows that transfers to the Lincoln Regional Center are conditioned upon a finding that the prisoner suffers from a mental disease or defect and cannot be adequately treated within the Penal Complex. The statute under which the plaintiffs' transfers were made specifically so states. Furthermore, the evidence shows that transfers to the Lincoln Regional Center are so conditioned in practice. Inmates are not assigned to the Lincoln Regional Center for any administrative or correctional purposes. Therefore, there was an objective expectation, firmly fixed in state law and official Penal Complex practice, that a transfer would not occur except when the inmate suffers from a mental disease or defect and that it cannot be adequately treated at the Penal Complex. This case, there-

fore, comes within the exception noted in *Meachum.* Furthermore, the fact of greater limitations on freedom of action at the Lincoln Regional Center, the fact that a transfer to the Lincoln Regional Center has some stigmatizing consequences, and the fact that additional mandatory behavior modification systems are used at the Lincoln Regional Center combine to make the transfer a "major change in the conditions of confinement"[5] amounting to a "grievous loss"[6] to the inmate. We therefore hold that due process attached to the plaintiffs' liberty interest, and the task of the court is to determine what process is due and whether the procedures provided to these plaintiffs were adequate. See *Morrissey v. Brewer,* 408 U. S. 471, 484 (1972).

II.

Because due process is a flexible concept to be fitted to each setting, some analytical framework is helpful in deciding the specific steps that fit a specific setting. *Mathews v. Eldridge,* 424 U. S. 319, 334-355 (1976), suggests

> ". . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g., Goldberg v. Kelly, supra,* at 263-271."

As to the first factor, the private interest in this case is the plaintiffs' interest in avoiding the entry of a more

controlled confinement and being labeled mentally ill. Because the plaintiffs have already been deprived of much of their freedom of choice, this private interest is not identical to the interest of nonprisoners who are being considered for civil commitment, as in *Doremus v. Farrell,* 407 F. Supp. 509 (U. S. D. C. Neb. 1975). Entry into a mental hospital still carries some distinctive stigma, which in the specific setting of this case is accompanied by techniques of behavior modification[7] not used at the Penal Complex, so the interest of the plaintiffs is not the same[8] as that of other prisoners who are being considered for transfer from one prison to another, as in *Meachum,* supra, and *Montayne,* supra, or that of other prisoners who are being taken through prison disciplinary proceedings, as in *Wolff v. McDonnell,* 418 U. S. 539 (1974).

Second, the risk of an erroneous deprivation of these private interests is relatively high where the only safeguard used is the opinion of one physician or psychologist without opportunity for anyone—the prisoner or anyone on his behalf—to question that opinion. This is especially true because the inmate may be mentally unable to understand or to challenge the conclusions. Other procedural safeguards, such as written prior notice, a hearing, written findings, and someone to speak for the one claimed to be mentally ill, have self-evident value in reducing the risk.

Third, the state's interest in placing a mentally ill person into the institution best equipped to treat him is strong and deserves primacy. Swiftness does not appear to be a major need, in view of the availability at the Penal Complex of physical security, some psychiatric and

psychological staff, and a hospital. Hazards of calling witnesses at a hearing, either within or outside the Penal Complex, whether those witnesses are prisoners or nonprisoners, are certainly less when the issue is whether the inmate is mentally ill than when the issue is whether the inmate has committed some infraction for which he should be disciplined.[9] Usually, the witnesses in a mental hearing will be nonprisoners.

In *Morrissey v. Brewer,* 408 U. S. 471 (1972), the court listed six procedural safeguards as minimal requirements of due process where the issue was what process is due a parolee on revocation of his conditional liberty:

1. Written notice of the claimed violations of parole;
2. Disclosure at a hearing of the evidence in support of the state's claim;
3. An opportunity to be heard in person and to present witnesses and documentary evidence;
4. The right to confront and cross-examine witnesses (unless the hearing officer specifically found good cause for not allowing confrontation);
5. A hearing before a neutral and detached hearing body, members of which do not need to be judicial officers; and
6. A written statement by the decisionmaker as to the evidence relied upon and the reasons for any adverse decision.

Each of these, and others, will be discussed in terms of a proceeding to determine whether a prisoner should be transferred to a mental hospital.

Formal notice that transfer to a mental hospital is being considered, disclosure to the prisoner of the evidence being relied upon for the transfer, and an opportunity to be heard in person and to present documentary evidence are so fundamental that little discussion of them is needed. See *In re Gault,* 387 U. S. 1 (1967). We perceive no consideration that militates against requiring those basic and vital procedures.

Calling of witnesses by the defense and confronting of all witnesses called by the state stand on a somewhat different footing. It cannot be denied that friction between prisoners arising in or because of a hearing at which prisoners testify against prisoners is a relevant factor, at least when the hearing is within the prison, but the nature of the inquiry in a mental hearing holds a sufficiently low possibility of friction that it appears to us there is a right to call witnesses and to confront and cross-examine witnesses, except upon a finding, not arbitrarily made, of good cause for not permitting each as to a particular witness.

A neutral and detached hearing body is essential. While a judicial officer is not required, and the decisionmaker need not be from outside the prison or hospital administration,[10] at least the examining or treating physician or psychologist should not be permitted to vote on the commitment decision.[11] A written statement by the factfinding body as to the evidence relied upon and the reasons for transferring the inmate should be made. We see no relevant factors different from those noted by the court in *Wolff v. McDonnell,* 418 U. S. at 565.

The availability of counsel is as critical to a prisoner who may be mentally ill as it is to a nonprisoner in the same condition. The capability to examine, understand, evaluate and challenge the process and the evidence is vital and there may be nobody available to do so, unless it be by counsel, furnished by the state, if need be, because of indigency. The state's interest in avoiding hearings having an adversary cast which may tend to obstruct achievement of correctional goals, recognized in *Wolff v. McDonnell,* 418 U. S. at 569-570, are overshadowed by the disability which accompanies one who is mentally ill.

It should be apparent that the prisoner's rights are largely illusionary unless he knows those rights. The procedure, therefore, should assure notice of them to him.

Accordingly, § 83-180 (1), R. R. S. Neb. 1943, is unconstitutional as applied to the plaintiffs, because none of the foregoing rights was afforded the plaintiffs.

To recapitulate, the minimal requirements of due process when a person is transferred from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center are these:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights.

This opinion does not seek to determine whether there are other procedures that would be useful or the best way to implement the constitutional demands. Those are matters for the legislative process and not for the courts.

III.

Persuaded as we are that § 83-180 (1) is unconstitutional as applied to these plaintiffs because of due process infirmities, we resolve the action on that basis. A prime obstacle to resolving the case on equal protection grounds, as was done in *Baxtrom v. Herold,* 383 U. S. 107 (1966), is that an equal protection analysis requires a comparison of the § 83-180 (1) procedure with a more favorable procedure afforded persons not in the class described in § 83-180 (1). At the time the plaintiffs were transferred to the Lincoln Regional Center, the procedure used for committing nonprisoners to mental hospitals was constitutionally defective. It was so declared in *Doremus v. Farrell,* supra, as failing to provide due process. That procedure, therefore, is a poor standard

for comparison purposes. The present procedure for civil commitments, found in § 83-1001, et seq., became effective on April 6, 1976, which was after the plaintiffs were transferred to the Lincoln Regional Center. We do not mean to say that an equal protection analysis could not be made; we mean only that hurdles exist which need not be cleared. Even under an equal protection analysis, the ultimate question of the propriety of differentiating procedures for prisoners and nonprisoners probably depends upon a weighing of the factors discussed in this opinion regarding due process. Whether the Nebraska legislature ultimately decides to use a procedure for transferring prisoners to a mental hospital that differs from that for committing nonprisoners must be left to the good judgment of the legislature, limited only by constitutional strictures.

IV.

The precise relief to be ordered for the individual plaintiffs should be fashioned after suggestions from counsel. The order which is filed at the time of this memorandum will require the making of specific proposals.

The foregoing memorandum of decision constitutes the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.

Dated

BY THE COURT:

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

Footnote 1. On August 18, 1976, this action was certified as a class action by Charles Miller on behalf of all persons presently confined in the Lincoln Regional Center, Security Building, who have been transferred there from the Nebraska Penal and Correctional Complex pursuant to §§ 83-179 and 180, and all persons presently confined to the Nebraska Penal and Correctional Complex. Following a hearing, however, the action was decertified. William McKinley Hines, William George Foote, and Larry D. Jones were added as individual plaintiffs-intervenors thereafter on their motions. Hines was returned to the Nebraska Penal and Correctional Complex and has been released on parole. No evidence has been offered to support his claim and the action evidently is no longer being pursued by him, so his claim will be dismissed. Foote and Miller have been returned to the Nebraska Penal and Correctional Complex, but remain subject to the procedures in § 83-180.

Footnote 2. Mentioned also in the complaint is a challenge to § 83-179, which provides for an evaluation of persons upon initial admission to a state institution, but this statute was not responsible for the transfer of any of the plaintiffs to the Lincoln Regional Center and it need not be dealt with separately in this case.

Footnote 3. The involuntariness of the transfer of Larry D. Jones is not crystal clear from the evidence, because he was asked by the examining psychiatrist before his transfer whether he wanted to be transferred and he said that he did, but was offered no procedure by which he could receive independent advice on the subject and he may well not have been competent to exercise a free choice.

Footnote 4. Section 83-176, R. R. S. Neb., declares that whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services, "he shall be deemed to be sentenced or committed to the Department." The Director of Correctional Services, according to the statute, is authorized to designate as the place of confinement of any person committed to the department "any available, suitable or appropriate residence facility or institution, whether or not operated by the state, and may transfer such person from one place of confinement to another," with some declared restrictions as to minors.

Footnote 5. See *Wolff v. McDonnell,* 418 U. S. 539, 571-572, n. 19 (1974).

Footnote 6. *Morrissey v. Brewer,* 408 U. S. 471, 482 (1972).

Footnote 7. The evidence before us would not support a statement like that made in *United States ex rel. Schuster v. Herold,* 410 F. 2d 1071, 1078 (C. A. 2nd Cir. 1969):

> ". . . Yet he [the transferred prisoner] will be confined with men who are not only mad but dangerously so. . . . [H]e will be exposed to physical, emotional and general mental agony. Confined with those who are insane, told repeatedly that he too is insane and indeed treated as insane, it does not take much for a man to question is own sanity and in the end to succumb to some mental aberration."

Footnote 8. These techniques were only generally described at the trial, but appear to include medication.

Footnote 9. For a discussion of the hazards related to disciplinary hearings, see *Wolff v. McDonnell,* 418 U. S. at 566-569.

Footnote 10. See *Withrow v. Larkin,* 421 U. S. 35 (1975); *Hortonville Joint School District v. Hortonville Education Association,* 426 U. S. 482 (1976); *Wolff v. McDonnell,* 418 U. S. at 570-571 (1974).

Footnote 11. See *Doremus v. Farrell,* 407 F. Supp. 509, 517 (U. S. D. C. Neb. 1975), and cases cited there.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE,
WILLIAM McKINLEY HINES,
and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, et al.,

Defendants.

ORDER

(Filed September 12, 1977)

Pursuant to the accompanying memorandum of decision,

IT HEREBY IS ORDERED:

1. That William McKinley Hines is dismissed as a plaintiff-intervenor; and

2. That counsel shall submit to the court within fifteen days of the date of this order specific proposals for the relief to be granted to the plaintiffs, consistent with such memorandum of decision.

Dated September 12, 1977.

BY THE COURT

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER, etc.,

Plaintiff,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

JUDGMENT

(filed October 27, 1978)

Pursuant to the memorandum of decision of September 12, 1977, filing 57, and the memorandum of decision regarding mootness of today,

IT IS ADJUDGED AND DECREED:

1. That § 83-180(1), Nebraska R. R. S. 1943, is declared to be unconstitutional as applied to the plaintiffs in that it denied the plaintiffs due process of law;

2. That this lawsuit is moot as to the plaintiff Charles Miller and as to the plaintiff-intervenor William George Foote and the action is therefore dismissed as to them; and

3. That the defendants are enjoined from transferring the plaintiff-intervenor Larry D. Jones, at any time before his complete discharge from the custody of the State of Nebraska on the criminal sentence which he is now serving, to the Lincoln Regional Center, except by a procedure which includes each of the following:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights.

Dated October 25th, 1978.

BY THE COURT:

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER, etc.,
Plaintiff,

vs.

JOSEPH VITEK, et al.,
Defendants.

MEMORANDUM OF DECISION
REGARDING MOOTNESS

(Filed October 27, 1978)

This case is now before the court on remand from the Supreme Court of the United States for consideration of the question of mootness. The issue presented is whether the fact that the plaintiff-intervenor, Larry D. Jones, is now on parole, but subject to and under the threat of transfer to the state mental hospital for examination,

study and treatment, moots his claim of the unconstitutionality of § 83-180 R. R. S. Neb. 1943 (Reissue 1976). The statute in question authorizes the transfer of a state prisoner, without his consent, to a state mental hospital when a physician or psychologist finds that the prisoner suffers from a mental disease or defect which may not properly be treated within the facility in which he is confined.

Larry D. Jones was convicted of robbery and was sentenced to a prison term in the Nebraska Penal and Correctional Complex. After serving part of his sentence in the Penal Complex from May, 1974, to January, 1975, Jones was transferred to the penitentiary hospital. Two days later he was placed in solitary confinement in the adjustment center of the Penal Complex, where he set his mattress on fire, thereby burning himself. Jones then was sent to the burn unit of a private hospital. Upon his release from that hospital, he was transferred to the security unit of the Lincoln Regional Center, pursuant to § 83-180.

In April, 1976, Jones sought to intervene in this civil rights action, which was brought by another prisoner who had been transferred from the Penal Complex to the Lincoln Regional Center, contesting the constitutionality of § 83-180. This court on October 14, 1977, declared § 83-180 (1) unconstitutional as applied and enjoined the transfer of Jones from the penal facility to the Lincoln Regional Center unless certain due process requirements were met. *Miller v. Vitek,* 437 F. Supp. 569 (U. S. D. C. Neb. 1977).

On appeal, the Supreme Court of the United States noted that Jones had been granted parole for the purpose

of allowing him to receive inpatient psychiatric care at the Veterans Hospital in Danville, Illinois, vacated the judgment, and remanded the case for consideration of the question of mootness. *Vitek v. Miller,* — U. S. —, 98 S. Ct. 2276 (1978).

Since the remand, according to the defendants' counsel, Jones has been granted "a very limited parole 'to obtain inpatient psychiatric services,'" and "is presently under investigation for violation of even this limited assignment." Defendants' brief on the question of mootness, p. 5. It is stated that Jones' tentative discharge date is March 28, 1982. While on parole, Jones may be required by the parole board to "[s]ubmit himself to available medical, psychological, psychiatric or other treatment." § 83-1,116 R. R. S. Neb. 1943 (Reissue 1976). Although the parole board has legal custody of an inmate on parole, the Director of Correctional Services establishes the policies for the parole board and his department supervises persons on parole. § 83-173 R. R. S. Neb. 1943 (Reissue 1976).

Until Jones' release "[t]he defendants claim not only the right to transfer the plaintiff-intervenor for examination, study and treatment at the Lincoln Regional Center in accordance with § 83-180, . . . but also they consider the statutory procedure the better and intend to follow it . . ." Defendants' brief on the question of mootness, p. 6.

The defendants view the due process requirements mandated by this court for the transfer of a prisoner to a state mental institution pursuant to § 83-180 as "an existing and immediate restraint upon the full and com-

plete exercise of the rights and duties of the prison authorities and the State of Nebraska as conferred and assigned to them by the legislative arm of the state." *Id.,* at p. 8.

In *DeFunis v. Odegaard,* 416 U. S. 312 (1974), the Supreme Court of the United States declared the issue of discrimination in the admissions process of a law school moot after the plaintiff himself had been admitted to the law school and the school's policy was to allow him to finish his legal education. The court stated:

> "There is a line of decisions in this Court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' . . . These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of a unilateral change in the *admissions procedures* (emphasis the court's) of the Law School. For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance 'that "there is no reasonable expectation that the wrong will be repeated."' United States v. W. T. Grant Co. [345 U. S.] at 633, 97 L. Ed. 1303. Otherwise, '[t]he defendant is free to return to his old ways,' id., at 632, 97 L. Ed. 1303, and this fact would be enough to prevent mootness because of the 'public interest in having the legality of the practices settled.' Ibid. But *mootness in the present case depends* not at all upon a 'voluntary cessation' of the admissions practices that were the subject of this litigation. It depends, instead, *upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of*

the Law School to permit him to complete the term for which he is now enrolled." (Emphasis added.)
416 U. S. at 318.

The Supreme Court found DeFunis' claim moot because (1) DeFunis was currently unaffected by the allegedly unconstitutional admissions practices—he had been admitted to the law school; and (2) DeFunis would not be affected in the future—the law school had agreed to allow him to complete his legal education.

Unlike the claim in *DeFunis,* the plaintiff-intervenor's claim in the case here is not moot. Although Jones is not currently being held in the state mental hospital pursuant to § 83-180, he is subject to and is in fact under threat of being transferred to the state mental hospital under § 83-180. In their brief to this court the defendants declared at page 9:

> "The defendants consider, because plaintiff-intervenor Jones' history of mental illness indicates a serious threat to his own safety, as well as to that of others, and the number of years he has left to serve before he is entitled to complete discharge, that there is a very real expectation that the situation which the three-judge court termed 'wrong' will recur; therefore the need for both the defendants and plaintiff-intervenor to have a determination of the legal procedure continues to exist. . . . "

Larry D. Jones is in the custody of the state and is subject to § 83-180. He has been a mental patient and may well be required to submit to further medical examination and treatment. His anticipated date of release is March 1982. The state and the plaintiff-intervenor both thus have current and adverse interests with respect to the procedures required by the due process clause, if

any, before a prisoner is transferred pursuant to § 83-180. See *DeFunis v. Odegaard,* supra, at 319-320.

Dated October 25th, 1978.

BY THE COURT:

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE and
LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the

Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

NOTICE OF APPEAL

(Filed Nov. 21, 1978)

Notice of appeal to the United States Supreme Court is hereby given by the defendants listed from the Judgment entered herein on or about October 25, 1978, except paragraph 2 thereof.

This appeal is taken pursuant to 28 U. S. C. § 1253, 28 U. S. C. § 2281, and 28 U. S. C. § 2282 from the judgment of a three-judge court declaring Nebraska statute sec. 83-180(1), Nebr. R. R. S. 1943 unconstitutional and enjoining state officers from enforcing the provisions of a Nebraska state statute because of its unconstitutionality, which action was commenced on or about the 12th day of November, 1975.

Respectfully submitted,

JOSEPH VITEK, et al.,
Defendants

By PAUL L. DOUGLAS
Attorney General of Nebraska

By /s/ Melvin Kent Kammerlohr
Melvin Kent Kammerlohr
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been served upon the opposing counsel of record, Mr. Thomas A. Wurtz, the only party required to be served in this action, by mailing said copy, first class postage prepaid, addressed to Mr. Thomas A. Wurtz, University of Nebraska College of Law, Lincoln, Nebraska 68583.

Dated this 21st day of October, 1977

/s/Melvin Kent Kammerlohr
Member of the Bar of the Supreme
Court of the United States

EXHIBIT G

83-173. Director of Correctional Services; duties. The Director of Correctional Services shall:

(1) Supervise and be responsible for the administration of the Department of Correctional Services;

(2) Establish, consolidate, or abolish any administrative subdivision within the department and appoint and remove for cause the heads thereof, and delegate appropriate powers and duties to them;

(3) Establish and administer policies and programs for the operation of the facilities in the department and for the custody, control, safety, correction and rehabilitation of persons committed to the department;

(4) Appoint and remove the chief executive officer of each facility and delegate appropriate powers and duties to him;

(5) Appoint and remove employees of the department and delegate appropriate powers and duties to them;

(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the department, the administration of facilities, and the conduct of officers and employees under his jurisdiction;

(7) Designate the place of confinement of persons committed to the department subject to the provisions of section 83-176;

(8) Collect, develop and maintain statistical information concerning persons committed to the department, sentencing practices and correctional treatment as may be useful in penological research or in the development of treatment programs;

(9) Provide training programs designed to equip employees for duty in the facilities and related services of the department and to raise and maintain the educational standards and the level of performance of such employees;

(10) Transmit annually to the Governor and the Director of Public Institutions a report of the operations of the department for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

(11) Exercise all powers and perform all duties necessary and proper in carrying out his responsibilities.

83-176. Director of Correctional Services; designate place of confinement; minor serious threat to safety; how determined. (1) Whenever any person is sentenced or

committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the department.

(2) The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women, or any other facility designated primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities. The determination as to whether the minor is a serious threat to safety shall be made only after juvenile court hearing in the court of original disposition, at which the minor shall have the right to be represented by counsel.

83-179. Person committed; physical examination; evaluation; contents; recommendations. Upon his initial

admission to a facility, each person committed to the department shall be given a physical examination and a thorough evaluation He shall be kept apart from other persons committed to the department until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

EXHIBIT H

STATE OF NEBRASKA

Board of Parole

CHARLES THONE
Governor

John B. Greenholtz, Chairman
Eugene E. Neal, Member
Robert J. Keller, Member
Edward M. Rowley, Member
Doris D. Collins, Member

State Capitol
P. O. Box 94754
Lincoln, Nebraska 68509

Dept. of Justice
JAN 9, 1979
State of Nebraska

January 8, 1979

TO WHOM IT MAY CONCERN:

I, Rose Marie Johnston, as Administrative Assistant to the Nebraska Board of Parole and in charge of office records, do hereby certify that the attached copy of order revoking parole is a true and exact copy of said document as taken from the file of Larry Jones, Nebraska Penal and Correctional Complex Number 29327, on file in the office of the Board of Parole.

Dated this 8th day of January, 1979.

NEBRASKA BOARD OF PAROLE

/s/ Rose Marie Johnston
Administrative Assistant

Subscribed and sworn to before me this 8th day of January, 1979.

/s/ Nikki B. Wright
Notary Public

SEAL

STATE OF NEBRASKA
BOARD OF PAROLE

ORDER REVOKING PAROLE

Know All Men By These Present:

That Larry Jones No. 29327 was on the 31st day of May, 1974 convicted in the District Court of Douglas County, Nebraska, of the crime of Robbery and was sentenced to the Nebraska Penal & Correctional Complex at Lincoln, Nebraska on the 31st day of May, 1974, and

That in accordance with the Laws of the State of Nebraska and the rules of the Board of Parole, said Larry Jones No. 29327 was, on the 17th day of November, 1977 paroled by said Board of Parole, to go outside of the buildings and enclosure of said Nebraska Penal & Correctional Complex, but not outside of the State of Nebraska without special permission, subject, however to the conditions stipulated in a certain parole agreement executed in triplicate and signed by said parolee, and

WHEREAS, it has come to the knowledge of the Board of Parole that the said Larry Jones has violated the conditions of said parole agreement and has therefore forfeited his right to remain longer on parole, now

THEREFORE, it is hereby ordered that the said Larry Jones No. 29327 be apprehended and returned to the said Nebraska Penal & Correctional Complex to be there further dealt with under the provisions of the original sentence as the law in such cases provides. Delinquency date is hereby fixed as October 4, 1978.

It is further ordered that any law enforcement officer in the State of Nebraska be and he is hereby author-

ized and directed to arrest said Larry Jones whenever and wherever found, and hold him for return to the said institution.

Dated at Lincoln, Nebraska, this 8th day of January, 1979.

STATE OF NEBRASKA—BOARD OF PAROLE

/s/ John B. Greenholtz
Chairman

/s/ Eugene E. Neal
Member

/s/ Edward M. Rowley
Member

Supreme Court, U. S.
FILED
MAY 17 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

LARRY D. JONES,

Appellee.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

DOCKETED JANUARY 22, 1979

[redacted]URISDICTION Postponed

APRIL 23, 1979

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

APPENDIX

In The

Supreme Court of the United States

October Term, 1978

—o—

No. 78-1155

—o—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

LARRY D. JONES,

Appellee.

—o—

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

DOCKETED JANUARY 22, 1979

PROBABLE JURISDICTION NOTED

APRIL 23, 1979

INDEX

Pages

Relevant Docket Entries 1

INDEX—Continued

	Pages
Complaint	3
Answer	14
Joint Stipulation of Facts	15
Complaint of Intervener	18
Answer to Intervener Larry Jones	24
Motion for Summary Judgment	25
Memorandum and Order on Motion for Summary Judgment	26
Motion to Amend the Order Denying Summary Judgment	31
Notation as to Location of the Decision and Orders in Question	32

RELEVANT DOCKET ENTRIES

Date		Proceedings
1975		
Nov 12	1	Order (WKU) granting Leave to Proceed In Forma Pauperis. Copy mailed to counsel of record.
Dec 2	7	Defendants' Answer.
1976		
Feb 19	12	Plaintiff's motion to certify class action.
Mar 17	17	Joint Stipulation of Facts.
Mar 18	18	Memorandum and Order (WKU) granting motion to certify class action (No. 12) and action shall proceed as a Class Action. Copy mailed to counsel of record.
Apr 30	27	Motion of Larry Jones to intervene as plaintiff w/copy of Complaint.
May 21	32	Complaint of Intervenor Larry Jones, with certificate of service on the Attorney General of the State of Nebraska. Mailed copy of Order — Filing No. 29 to Attorney General, and delivered copy to Lincoln Legal Services.
Aug 3	34	Entered Defendants' Motion for Summary Judgment filed 8-2-76.
Aug 26	40	Entered Memorandum and Order (DPL) (WKU) (RVD) filed 8-24-76 denying Defendants' motion for summary judgment (No. 34). Copy mailed to counsel of record.
Sep 1	41	Defendants' Motion to Amend the Order Denying Summary Judgment.
Sep 9	42	Memorandum and Order (WKU) denying Defendants' Motion to Amend Order Denying Summary Judgment (No. 41). Copy mailed to counsel of record.
Nov 22	53	Transcript of Testimony on 11-12-76.
1977		
Sep 12	57	Memorandum of Decision (WKU), (DPL), (RVD).

58 Order (WKU), (DPL), (RVD), that William McKinley Hines is dismissed as a plaintiff-intervenor; and that counsel submit within 15 days, specific proposals in accordance with Memorandum.

Copy mailed to counsel and Charles Miller of order and memorandum.

Oct 14 61 Judgment (WKU), (DPL), (RVD), that 83-180(1), Nebraska R. R. S. 1943 is declared to be unconstitutional as applied to plaintiffs; that this lawsuit is moot as to plaintiff Charles Miller and plaintiff-intervenor William George Foote, and the action dismissed as to them; and that defendants are enjoined from transferring plaintiff-intervenor Larry D. Jones from Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except under conditions prescribed in this Judgment.

Copy mailed to plaintiffs of record, counsel of record.

Oct 21 62 Defendants' Notice of Appeal with certificate of service on 10-21-77.

Dec 22 63 Order (WKU) that Clerk of this Court transmit the original pleadings, transcript, and exhibits to Supreme Court of the United States.

Copy mailed to counsel of record.

Dec 28 Original file, transcript, and one exhibit mailed to Clerk of Supreme Court of the United States.

1978

Mar 9 64 Entered Certified Copy of Order, Supreme Court of the United States, filed 3-6-78, noting probable jurisdiction.

Jun 22 67 Certified copy Judgment, Supreme Court of the United States, remanding for consideration of question of mootness; and vacating District Court Judgment.

Oct 27 70 Memorandum of Decision Regarding Mootness (DPL) (WKU) (RVD).

71 Judgment (DPL) (WKU) (RVD) declaring State Statute unconstitution as applied to plaintiffs; declaring lawsuit moot as to plaintiffs Miller and Foote and dismissing action as to them; and enjoining defendants from transferring plaintiff Jones to Lincoln Regional Center, except by certain procedure.

Copy mailed to counsel of record.

Nov 22 72 Entered Defendants' Notice of Appeal filed 11-21-78.

Copy mailed to Tom Wurtz and Larry Jones.

Entered Defendants' brief on question of mootness received by Judge Urbom on 7-17-78.

Entered Plaintiffs' brief on question of mootness received by Judge Urbom on 7-19-78.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil Action No. CV 75-L-172

CHARLES MILLER, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

COMPLAINT

INTRODUCTION

This is a civil rights action on behalf of plaintiff and all other persons held at the Lincoln Regional Center,

Security Building, who have been transferred from the Nebraska State Penal Complex, and all persons who are presently subject to similar transfer pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971). Plaintiff seeks a declaration that NEB. REV. STATS. §§ 83-179, and 83-180 (Reissue 1971) on their face and as applied by the defendants are unconstitutional for the reason that they deny plaintiff and the class he represents, due process and equal protection of the law. Plaintiff seeks injunctive relief in the form of an order that they be released from custody at the Lincoln Regional Center, Security Building, and returned to the Nebraska Penal Complex.

JURISDICTION

1. Plaintiff, individually and on behalf of all other persons similarly situated, brings this action under the Fifth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is authorized by 28 U. S. C. § 1343 (3) and (4).

2. Plaintiff seeks declaratory relief pursuant to 28 U. S. C. §§ 2201 and 2202 and injunctive relief pursuant to 42 U. S. C. § 1983.

THREE-JUDGE COURT

3. This is a proper case for determination by a three-judge court pursuant to 28 U. S. C. §§ 2281 and 2284 since plaintiff seeks an injunction to restrain defendants, who are state officials, from the enforcement, operation and execution of state statutes of state-wide applicability on the ground that said state statutes are contrary to the Constitution of the United States.

PLAINTIFF

4. The plaintiff, CHARLES MILLER, is an 18 year old, black, male resident of Lincoln, Nebraska. He is a

United States citizen and a single person with no one dependent on him for support. Plaintiff was convicted of unlawful flight to avoid arrest while operating a motor vehicle in Douglas County, and was sentenced to the Nebraska Penal Complex for one to three years. He was received at the Nebraska State Penal Complex March 25, 1974, and was subsequently transferred to the Lincoln Regional Center, Security Building, May 31, 1974. Plaintiff is presently being held against his will at the Lincoln Regional Center, Security Building, pursuant to the transfer under NEB. REV. STATS. §§ 83-179 and 180 (Reissue 1971).

DEFENDANTS

5. Defendant JOSEPH VITEK, is the Director of the Nebraska Department of Corrections.

6. Defendant ROBERT PARRATT is the Warden of the Nebraska Penal and Correctional Complex.

7. Defendant JACK CLEAVINGER, is the Director of the Department of Public Institutions.

8. Defendant KLAUS HARTMANN, M. D., is the Superintendent of the Lincoln Regional Center.

9. Defendant BENJAMIN COATES, M. D., is the head of the Security Building at the Lincoln Regional Center.

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this action pursuant to Rule 23 of the Federal Rule of Civil Procedure on behalf of all persons who have been transferred from the Nebraska Penal Complex to the Lincoln Regional Center Security Building, and all those persons who are presently subject to similar transfer pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

11. The class consists of a number of persons so numerous that joinder of all its members is impracticable. There are questions of law and fact common to the class. The position of the plaintiff as representative of the class is typical of the class. Plaintiff will fairly and adequately represent the class. Prosecution of separate actions by individual members of the class would result in inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the defendants. Adjudication with respect to individual members of the class would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

12. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

13. The questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for a fair and efficient adjudication of the controversy. Since there is no conflict among the interests of the members of the class, members have no interest in individually controlling the prosecution of separate actions. This Court is a desirable forum in which to concentrate the litigation of the claims of the class, since it has the power to hear all the claims and to grant appropriate relief. There are not likely to be any difficulties in the management of a class action, since the whereabouts of all members of the class is known, and all members can easily be informed of this action.

STATEMENT OF FACTS

14. The Plaintiff, Charles Miller, was convicted in Douglas County, of unlawful flight to avoid arrest while operating a motor vehicle, and was sentenced to the Nebraska Penal Complex for one to three years, sentence to begin March 20, 1974. Plaintiff arrived at the Nebraska Penal Complex on March 25, 1974.

15. Plaintiff was transferred to the Lincoln Regional Center, Security Building, on or about May 31, 1974, because he allegedly suffered from a mental disease or mental defect. Plaintiff, for the duration of his initial admission to the Nebraska Penal Complex, was given the routine physical examination, but received minimal or no psychiatric evaluation from a physician, psychologist or psychiatrist. Plaintiff's transfer to the Lincoln Regional Center, Security Building, came on or about May 31, 1974, without advance notice. He has been kept in custody at the Lincoln Regional Center, Security Building, continuously from his initial placement there until the time of the filing of this Complaint.

16. On numerous occasions, plaintiff has requested a transfer back to the Nebraska Penal Complex. In reply to such requests, plaintiff was either refused or received no reply. At no time has plaintiff been brought before a Court of the State of Nebraska, nor a Mental Health Commitment Board for a *judicial* determination of his alleged mental illness. At no time did plaintiff ever receive a thorough psychiatric or psychological evaluation.

17. Plaintiff was transferred from the Nebraska Penal Complex according to the statutory procedure pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971),

as is stated in the Department of Public Institutions "Request for Transfer", a copy of which is attached hereto as Exhibit "A", and incorporated herein by reference.

18. At all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

19. At all times material herein, defendants and each of them, knew, or should have known, of the practices, acts and omissions alleged herein.

20. The duties of the defendants applicable to the transfer of the plaintiff from the Nebraska Penal Complex to the Lincoln Regional Center are as follows:

a. Pursuant to NEB. REV. STAT. § 83-179 (Reissue 1971) a prisoner is segregated at his initial admission for the purpose of being given a physical examination and thorough evaluation. He is kept apart from other persons committed to the division until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

b. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1971), when a physician designated by the Department of Corrections may make a finding that a person committed to the division suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the division suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Division of Corrections and shall be returned to the division when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

c. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1971), when the physician or psychologist designated by the Director of Corrections finds that a person committed to the division suffers from a physicial or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to,

and for the care, custody and security of the person in such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Division of Corrections, and shall be returned to the division when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

When two psychiatrists designated by the Director of Corrections find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

CAUSES OF ACTION

21. For the Causes of Action, plaintiffs incorporate paragraphs 1 through 20.

FIRST CAUSE OF ACTION

22. Neb. Rev. Stat. §§ 83-179, 180 (Reissue 1971) previously set out in the statement of facts are unconstitutional on their face as applied by the defendants in that such statutes and actions taken thereunder provide for the deprivation of liberty of the plaintiff and other class members without prior notice and opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

23. Neb. Rev. Stats. §§ 83-179,180 (Reissue 1971) previously set out in the statement of facts are unconstitutional on their face as applied by the defendants, in that such statutes and actions taken thereunder are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that all other classes of persons involuntarily confined in mental health facilities other than plaintiffs are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board. There is no rational, legitimate, or compelling state interest for treating plaintiffs in a different manner.

THIRD CAUSE OF ACTION

24. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out in the statement of facts are unconstitutional on their face and as applied by the defendants, because the statutory procedure does not provide plaintiffs the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the plaintiffs Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION

25. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out in the statement of facts, are unconstitutional on their face and as applied by the defendants,

in that they create a *standard* by which plaintiffs may be transferred to the Lincoln Regional Center, Security Building, which is *vague* and *overbroad*, which violates the plaintiff's right to Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiff on behalf of himself and all other persons similarly situated, prays that this Court:

1. Assume jurisdiction of this cause.

2. Declare that NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) are unconstitutional on their face, for the defendants through their individual and collective effect of their acts and practices pursuant to these statutes:

A. Deprive plaintiff and the class he represents of their liberty without prior notice and a meaningful hearing within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

B. Deprive plaintiff and the class he represents the equal protection of the laws, in that all other classes of persons involuntarily confined in mental health facilities, other than plaintiffs, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board;

C. Deprive plaintiff and the class he represents the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the plaintiff's Due Process of Law in violating the Fourteenth Amendment to the United States Constitution.

D. Deprive plaintiff and the class he represents Due Process of Law in that plaintiffs may be transferred to the Lincoln Regional Center, Security Building, on the basis of a standard which is vague and overboard, in violation of the Fourteenth Amendment to the United States Constitution.

3. That a preliminary and permanent injunction be issued, enjoining and restraining defendants from engaging in any of the unlawful acts, and practices complained of in this Complaint.

4. That the defendants be enjoined and restrained from detaining plaintiff or the members of the class he represents, in the Lincoln Regional Center, Security Building, so long as defendants continue to deprive them of their constitutional right to due process of law and the equal protection of the laws.

5. That the costs of this action be assessed against the defendants and that plaintiff be awarded reasonable attorney's fees.

6. For such other and further relief as this Court deems just and equitable.

Respectfully submitted,

CHARLES MILLER, Plaintiff

BY: /s/ Tom Wurtz

LEGAL AID SOCIETY OF LINCOLN, INC.

800 Anderson Building
Lincoln, Nebraska 68508
(402) 435-2161

(Verification omitted.)

(Exhibit "A" Omitted.)

(Title omitted in printing.)

ANSWER

Come now the defendants and for answer to the petition filed herein:

1. Admit that plaintiff is in the legal custody of the defendants by virtue of commitment to the Nebraska Penal and Correctional Complex by the District Court of Douglas County, Nebraska.

2. Sections 83-179 and 83-180, R. R. S. 1943, providing for the handling of a person found to be suffering from a physical or mental defect apply only to persons who are already in the legal custody of the Nebraska Penal and Correctional Complex by virtue of due process of law and are in no way comparable to the commitment of persons to mental institutions from the population at large.

3. That the petition fails to state grounds upon which relief may be granted.

4. That except as herein specifically admitted, the defendants deny each and every allegation in said petition.

JOSEPH VITEK, et al., Defendants

By PAUL L. DOUGLAS
Attorney General

By Mel Kammerlohr
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Defendants

(Certificate of Service omitted.)

(Title omitted in printing)

JOINT STIPULATION OF FACTS

STIPULATION OF FACTS

By CHARLES MILLER, Plaintiff
and JOSEPH VITEK, ROBERT PARRATT, JACK CLEAVENGER KLAUS HARTMANN, BENJAMIN (EDWIN A.) COATS, Defendants

Come now the parties hereto, by and through their respective attorneys of record, and state and stipulate as follows:

1. Plaintiff Charles Miller is an 18 year old, black male resident of Lincoln, Nebraska. He is a United States citizen and a single person with no one dependent upon him for support. He was convicted in Douglas County of unlawful flight to avoid arrest while operating a motor vehicle, and was sentenced to the Nebraska Penal Complex for a period of one to three years. He began to serve his sentence March 20, 1974. He arrived at the Nebraska Penal Complex March 25, 1974.

2. Defendants are as follows:

A. Joseph Vitek is the Director of the Nebraska Department of Correctional Services.

B. Robert Parratt is the Warden of the Nebraska Penal and Correctional Complex.

C. Jack Cleavenger is the Director of the Department of Public Institutions.

D. Klaus Hartmann is the Superintendent of the Lincoln Regional Center.

E. Edwin A. Coates, M.D., is the head of the Security Building at the Lincoln Regional Center.

3. The Lincoln Regional Center is a state hospital operated by the Department of Public Institutions. Its purpose is for the treatment of the emotionally disturbed, mentally ill, mentally diseased, and those suffering from mental defects.

4. All prisoners that are voluntarily or involuntarily transferred from the Nebraska Penal Complex and Nebraska State Reformatory to the Lincoln Regional Center are confined at the Security Building, Lincoln Regional Center, which is the institution's maximum security facility.

5. Plaintiff, Charles Miller, was involuntarily transferred to the Lincoln Regional Center, Security Building, on or about May 31, 1974, where he was kept in custody continuously from his initial placement there until the time of the filing of this complaint.

Plaintiff, Charles Miller, was admitted to the Nebraska Penal Complex and involuntarily transferred from the Nebraska Penal Complex in accordance and compliance with the statutory procedure pursuant to Neb. Rev. Stat. §§ 83-179 and 83-180 (Reissue 1971).

6. That at all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of Neb. Rev. Stat. §§ 83-179 and 83-180 (Reissue 1971).

7. Plaintiff, Charles Miller, on numerous occasions during the tenure of confinement at the Lincoln Regional

Center, Security Building, requested transfers back to the Nebraska Penal Complex.

8. Plaintiff, Charles Miller, has never been brought before a court of the State of Nebraska, nor a mental health commitment board for a judicial determination of the alleged mental illness.

9. Plaintiff, Charles Miller, after the filing of the motion for temporary restraining order herein on November 12, 1975, was transferred back to the Nebraska State Penal Complex, where he has been continually and is presently confined.

Dated this — day of March, 1976.

CHARLES MILLER, Plaintiff
By Tom Wurtz
LEGAL AID SOCIETY OF LINCOLN, INC.
800 Anderson Building
Lincoln, Nebraska 68508
Tel: (402) 435-2161
Attorney for Plaintiff

JOSEPH VITEK, ROBERT PARRATT, JACK CLEAVENGER, KLAUS HARTMANN, BENJAMIN (EDWIN A.) COATES, Defendants
By PAUL L. DOUGLAS
Attorney General
By Mel Kammerlohr
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682
Attorneys for Defendants

(Title omitted in printing.)

COMPLAINT OF INTERVENER

The intervening plaintiff, LARRY JONES, for his Complaint and cause of action, alleges and states as follows:

1. The intervening plaintiff is a twenty-two year old male, and a resident of Lancaster County, Nebraska.

2. The intervening plaintiff was convicted in Douglas County of Robbery and was sentenced to the Nebraska Penal and Correctional Complex for three to nine years. Intervening plaintiff arrived at the Nebraska Penal and Correctional Complex on May 31, 1974.

3. Intervening plaintiff was involuntarily transferred to the Lincoln Regional Center, Security Building, in April of 1975, because he allegedly suffered from a mental disease or mental defect. Said involuntary transfer came without advance notice. Intervening plaintiff has been kept in custody at the Lincoln Regional Center Security Building continuously from his initial placement there on or about April of 1975, until the time of the filing of this Complaint.

4. On numerous occasions intervening plaintiff requested a transfer back to the Nebraska Penal and Correctional Complex, and in reply to such requests received no reply. At no time has intervening plaintiff been brought before a Court of the State of Nebraska, nor a Mental Health Commitment Board, for a *judicial* determination of his alleged mental illness.

5. Intervening plaintiff was involuntarily transferred from the Nebraska Penal and Correctional Complex to

the Lincoln Regional Center Security Building pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

6. At all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

7. At all times material herein, defendants and each of them, knew, or should have known, of the practices, acts and omissions alleged herein.

8. The duties of the defendants applicable to the transfer of the plaintiff from the Nebraska Penal Complex to the Lincoln Regional Center are as follows:

a. Pursuant to NEB. REV. STAT. § 83-179 (Reissue 1971) a prisoner is segregated at his initial admission for the purpose of being given a physical examination and thorough evaluation. He is kept apart from other persons committed to the division until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

b. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1971), when a physician designated by the Depart-

ment of Corrections may make a finding that a percon committed to the division suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the division suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Division of Corrections and shall be returned to the division when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

c. Pursuant to NEB. REV. STAT. § 38-180 (Reissue 1971), when the physician or psychologist designated by the Director of Corrections finds that a person committed to the division suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in such hospital or psychiatric facility.

While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Division of Corrections, and shall be returned to the division when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

When two psychiatrists designated by the Director of Corrections find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

CAUSES OF ACTION

9. For the Causes of Action, intervening plaintiff incorporates paragraphs 1 through 8.

FIRST CAUSE OF ACTION

10. NEB. REV. STAT. §§ 83-179, 180 (Reissue 1971) as previously set out are unconstitutional on their face and as applied by the defendants in that such statutes and actions taken thereunder provide for the deprivation of liberty of the intervening plaintiff without prior notice and opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

11. NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) as previously set out are unconstitutional on their face and as applied by the defendants, in that such statutes and actions taken thereunder are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that all other classes of persons involuntarily confined in mental health facilities other than intervening plaintiff and the named plaintiff, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board. There is no rational, legitimate or compelling state interest for treating plaintiffs in a different manner.

THIRD CAUSE OF ACTION

12. NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) as previously set out, are unconstitutional on their face and as applied by the defendants, because the statutory procedures do not provide intervening plaintiff the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the intervening plaintiff Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION

13. NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) as previously set out, are unconstitutional on their face and as applied by the defendants, in that they create a standard by which intervening plaintiff may be transferred to the Lincoln Regional Center, Security Building,

which is vague and overbroad, which violates the intervening plaintiff's right to Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

REMEDIES AND RELIEF

WHEREFORE, intervening plaintiff prays that this Court:

1. Declare that NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) are unconstitutional on their face, and as applied by defendants, for the defendants through their individual and collective effect of their acts and practices pursuant to these statutes:

A. Deprive intervening plaintiff of his liberty without prior notice and a meaningful hearing within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

B. Deprive intervening plaintiff the equal protection of the laws, in that all other classes of persons involuntarily confined in mental health facilities, other than intervening plaintiff and the named plaintiff, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board;

C. Deprive intervening plaintiff the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny intervening plaintiff Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution;

D. Deprive intervening plaintiff Due Process of Law in that intervening plaintiff may be transferred to the Lincoln Regional Center, Security Building, on the basis of a standard which is vague and overbroad, in violation of the Fourteenth Amendment to the United States Constitution.

2. That the costs of this action be assessed against the defendants, and that plaintiff be awarded reasonable attorney's fees.

3. For such other and further relief as this Court deems just and equitable.

Respectfully submitted,

LARRY JONES, Intervening Plaintiff

By: /s/ Tom Wurtz
LEGAL AID SOCIETY OF LINCOLN, INC.

800 Anderson Building
Lincoln, Nebraska 68508
(402) 435-2161

Attorney for Intervening Plaintiff

(Verification omitted.)

(Title omitted in printing.)

ANSWER TO INTERVENOR LARRY JONES

Come now the defendants and generally deny each and every allegation in the complaint of the intervenor filed herein.

Further answering defendants aver that the complaint fails to state a cause of action upon which relief may be granted.

JOSEPH VITEK, et al., Defendants

By PAUL L. DOUGLAS
Attorney General of Nebraska

By Mel Kammerlohr
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Defendants

(Certificate of Service omitted.)

(Title omitted in printing.)

MOTION FOR SUMMARY JUDGMENT

Come now the defendants and respectfully move for a summary judgment herein for the reason that under any showing of facts within the purview of the pleadings filed herein the defendants would be entitled to judgment as a matter of law. The complaint fails to state a cause of action upon which relief may be granted and even a showing of disciplinary transfer (which is not pleaded) having a substantial adverse impact upon the prisoners would not violate any due process clause liberty interest of the prisoners.

WHEREFORE defendants respectfully move the court for a summary judgment in favor of defendants and dismissing plaintiff's complaint.

JOSEPH VITEK, et al., Defendants

By PAUL L. DOUGLAS
Attorney General

By /s/ Melvin Kammerlohr
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Defendants

(Certificate of Service omitted.)

(Title omitted in printing.)

MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

In this three-judge court action the plaintiffs, prisoners in the custody of the Department of Corrections of the State of Nebraska, challenge the Nebraska statutory scheme which allows state prisoners to be summarily transferred to a state mental hospital.

The defendants have filed a motion for summary judgment, filing 34. No affidavits or documents were submitted with the motion, except a brief discussing two recent United States Supreme Court cases. In *Meachum v. Fano,* 44 U.S.L.W. 5053, — U.S. — (June 25, 1976), the court held that the due process clause did not require a hearing for a state prisoner who was transferred from one state correctional institution to another. In the companion case to *Meachum, Montanye v. Haymes,* 44 U.S.

L.W. 5051, — U.S. — (June 25, 1976), the court held that no hearing was required whether or not the transfer resulted from the prisoner's misconduct or was disciplinary or punitive.

The plaintiffs have submitted affidavits and a brief in opposition to the motion for summary judgment. They argue that *Meachum* and *Montanye* do not apply to the transfer of prisoners from a correctional institution to a psychiatric one and that due process principles require procedural safeguards for such a transfer; that the process by which Nebraska prisoners are subjected to confinement and treatment in a mental hospital constitutes a denial of equal protection, because noninmates are accorded elaborate procedural protections before such confinement and treatment are allowed; and that the standard for commitment of prisoners is unconstitutionally vague and overbroad.

Because the pleadings, discovery documents, and affidavits on file fail to establish that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law, see Rule 56(c) of the Federal Rules of Civil Procedure, the motion will be denied.

The defendants' argument, based on the *Meachum* and *Montanye* cases, does not address the plaintiffs' claim that the transfer procedure denies equal protection and creates a standard which is vague and overbroad. The defendants are not entitled to a summary judgment on these issues.

As to the equal protection claim, the pleadings and the plaintiffs' affidavits establish as uncontested for the

purposes of this motion that the state has created one scheme for the psychiatric confinement and treatment of mentally ill prisoners and an entirely different one for the confinement and treatment of nonprisoners. On this record there is a genuine issue of material fact as to whether there is some basis for this unequal treatment. See generally, *Baxtrom v. Herold,* 383 U.S. 107 (1966).

With regard to the due process claim, it cannot be said that a summary judgment is in order, even if the two recent Supreme Court cases dealing with prisoner transfers are accepted as being as broad as the defendants argue in their brief. The complaints and affidavits of the plaintiffs are to the effect that (1) by reason of these transfers prisoners are subjected to compulsory psychiatric treatment which is not, at least in practice, authorized by reason of the criminal conviction, and (2) transfers are conditioned upon a finding that the prisoner has a mental disease or defect and cannot be given proper treatment in the prison. In this posture the case presents factual issues which are material to the limitations placed upon the express holdings in the *Meachum* and *Montanye* cases.

In the first place, the two Supreme Court cases apply only to actions which can be categorized as administrative in a broad sense[1] and which are authorized by virtue of

---

1 By this is meant actions which relate to the administration of the prison. No reference is here made to the distinction between transfers which are administrative and those that are punitive or disciplinary. See *Meachum v. Fano,* 44 U. S. L. W. at 5056, n. 6.

the state law governing the custody of prisoners and are not otherwise prohibited by constitutional considerations:

> " . . . [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and to subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . "

Meachum v. Fano, 44 U.S.L.W. at 5056.

The facts surrounding the essential nature of the transfers involved in the instant case still present a material issue bearing upon whether the transfers are of the same genre as those involved in *Meachum* and *Montanye.* Nothing submitted by the defendants or otherwise before the court establishes as uncontroverted the conclusion, proffered in the defendants' brief that these transfers are mere administrative actions; to the contrary, the plaintiffs' characterization, adequately based upon the pleadings and affidavits, is that these transfers are in all respects commitments to the state mental hospital, which are factually no different than the commitments which have recently been subjected to severe due process restrictions. See *Doremus v. Farrell,* CV75-O-168 (U.S.D.C. Neb. December 23, 1975); *Lessard v. Schmidt,* 349 F. Supp. 1078 (U.S.D.C. Wis. 1972), vacated 421 U.S. 957 (1975). Cf. *O'Connor v. Donaldson,* 422 U.S. 563 (1975).

Similarly, it would not be appropriate for the court to hold the due process issue foreclosed where, as here, allegations of a state law and practice conditioning the

transfer upon established contingencies are at issue. The *Meachum* and *Montanye* cases did not go that far:

> "The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events. . . . "
>
> *Meachum v. Fano,* 44 U.S.L.W. at 5054.

A further factual development is necessary before this court can properly determine whether the holdings in *Meachum* and *Montanye* vitiate the plaintiffs' due process claims in this case.

THEREFORE, IT HEREBY IS ORDERED that the defendants' motion for summary judgment, filing 34, is denied.

Dated August 17, 1976.

BY THE COURT

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

(Title omitted in printing.)

MOTION TO AMEND THE ORDER DENYING SUMMARY JUDGMENT

Come now the defendants and respectfully move the court to amend its order denying a summary judgment filed herein on August 24, 1976, to include the statement prescribed by § 28 U.S.C. 1292(b) that "in the opinion of the court such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" to enable defendants to request the United States Court of Appeals for the Eighth Circuit to permit an interlocutory appeal from said order as amended.

In making this motion defendants wish to emphasize that the issues involved in said motion for summary judgment and order denying the same are issues of first impression, they being based upon the two recent United States Supreme Court cases of *Meachum v. Fano,* 44 U.S.L.W. 53, — U.S. — (June 25, 1976) and *Meachum, Montanye v. Haymes,* 44 U.S.L.W. 50-51, — U.S. — (June 25, 1976), they also being cases of first impression.

Respectfully submitted,

JOSEPH VITEK, et al., Defendants

By PAUL L. DOUGLAS
Attornel General

By /s/ Mel Kammerlohr
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682
Attorneys for Defendants

NOTATION AS TO LOCATION OF THE DECISION AND ORDERS IN QUESTION

The Judgment, Memorandum of Decision and Order appealed from of the Three-Judge Court of the United States District Court for the District of Nebraska is set forth in the Jurisdictional Statement contained in the Appendix pages 1 through 25 thereof.

RECEIVED
MAR 26 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

—0—

No. 78-1155

—0—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—0—

MOTION OF APPELLEE TO PROCEED IN FORMA PAUPERIS

—0—

COMES NOW Larry D. Jones, Appellee herein, and moves this Court for leave to proceed in this action in forma pauperis pursuant to Rule 53, as he is unable to pay fees, costs, or costs of printing. Appellee is presently incarcerated in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

Appellee's affidavit in support of this motion is attached hereto.

Thomas A. Wurtz
Counsel for Larry D. Jones, Appellee
University of Nebraska College of Law
Lincoln, Nebraska 68583

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of Appellee to Proceed In Forma Pauperis was served upon the appellant by mailing a true copy thereof to Mr. Melvin Kammerlohr, Assistant Attorney General, 2115 State Capitol,

Lincoln, Nebraska 68509, first-class postage prepaid, on this 20 day of March, 1979.

Attorney for Appellee

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

—0—

No. 78-1155

—0—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—0—

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

—0—

I, Larry D. Jones, appellee herein, being first duly sworn, depose and say in support of my motion for leave to proceed in forma pauperis:

1. I am the appellee in the above-entitled action.

2. I am presently incarcerated in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

3. That I am unable because of my poverty to pay any fees, costs, or printing costs.

4. That I am entitled to the redress I seek in the above-entitled action.

5. The nature of said cause is briefly stated as follows:

> The State of Nebraska has appealed a judgment of a three-judge court, enjoining the State of Nebraska from transferring me to a mental institution without due process of law.

Larry D. Jones

Larry D. Jones, Appellee

STATE OF NEBRASKA)
) SS.
COUNTY OF LANCASTER)

DULY SUBSCRIBED AND SWORN to before me this 20 day of March, 1979.

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Affidavit was served upon the appellant by mailing a true copy thereof to Mr. Melvin Kammerlohr, Assistant Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, first-class postage prepaid, on this 20 day of March, 1979.

Attorney for Appellee

MAR 26 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

—0—

No. 78-1155

—0—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—0—

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

—0—

MOTION OF APPELLEE TO AFFIRM THE JUDGMENT BELOW FOR WANT OF A SUBSTANTIAL QUESTION

—0—

Thomas A. Wurtz
University of Nebraska
College of Law
Lincoln, Nebraska 68583
Tel: (402) 472-1263
Attorney for Appellees

2

TABLE OF CONTENTS

Pages

Motion to Affirm . . . . . .

State Statute and Nature of the Case . . . . . .

Argument . . . . . .

Conclusion . . . . . .

CASES CITED

Baxstrom v. Herold, 383 U.S. 107 (1966) . . . . . .

Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1977) . . . .

Matthews v. Eldridge, 424 U.S. 319 (1976) . . . . . .

Meachum v. Fano, 427 U.S. 215 (1976) . . . . . .

Montayne v. Haymes, 427 U.S. 236 (1976) . . . . . .

Morrissey v. Brewer, 408 U.S. 471 (1972) . . . . . .

Schuster v. Herold, 410 F.2d 1071 (1969) . . . . . .

Vitek v. Miller, 436 U.S. 407 (1978) . . . . . .

STATUTES CITED

Neb. Rev. Stat. § 83-180(1) (Reissue 1976) . . . . . .

CONSTITUTION CITED

Constitution of the United States, Fourteenth Amendment .

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

—0—

No. 78-1155

—0—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—0—

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

—0—

MOTION TO AFFIRM

—0—

The Appellee moves the Court to affirm the judgment of the court below, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

—0—

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

This appeal raises the question of the constitutionality of Neb. Rev. Stat. § 83-180(1) (Reissue 1976) as applied to the plaintiff-intervenor Larry D. Jones.

The statute provides for the involuntary transfers of persons sentenced to the Department of Correctional Services to a term of years, to the Lincoln Regional Center, a mental hospital, not within the Department of Correctional Services, but within Department of Public Institutions. The statute provides for such involuntary transfers without any formal notice or hearing or any other safeguard, other than determinations by one or more psychiatrists that the persons suffer from a mental disease or defect, and could not be given proper treatment within the Department of Correctional Services.

The appellants had previously appealed from the decision of a three-judge court of the United States District Court for the District of Nebraska entered on October 14, 1977, declaring Neb. Rev. Stat. § 83-180(1) to be unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. On May 23, 1978, this Court vacated the judgment entered October 14, 1977, and remanded the case for consideration of the question of mootness (Vitek v. Miller, 436 U.S. 407, 98 S.Ct. 2276, 56 L. Ed.2d 381).

On October 27, 1978, the district court entered a Memorandum of Decision that the case was not moot and reinstated the same judgment as was previously vacated. Appellants again filed notice of appeal on November 21, 1978. On January 8, 1979, Larry Jones, Appellee, had his limited parole revoked by the Board of Parole of the State of Nebraska, and presently remains confined in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

———0———

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

The Fourteenth Amendment to the Constitution of the United States forbids any state to "deprive any person of . . . liberty . . . without due process of law."

The court below, in recognizing that due process is a flexible concept, chose to use the analytical framework set out by this Court in the case of Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976) which suggested:

> ". . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail. See, e.g., Goldberg v. Kelly, supra, at 263-271."

The court below closely evaluated plaintiff's private interest of his avoidance of being stigmatized and labeled mentally ill, and his avoidance of a more controlled confinement, which would include behavior modification through the use of drugs. The court felt the risk of an erroneous deprivation of these private interests to be high. After balancing these and the state's interest the court merely made a factual determination that the involuntary transfer in question was tantamount to a major change in the plaintiff's condition of confinement which amounted to a grievous loss. Clearly, the plaintiff has a protected liberty interest in the avoidance of being stigmatized men ally ill, and subjected to chemotherapy and behavior modification programs. Due process, therefore, attached to the plaintiff's liberty interest.

Minimal due process requirements were then ordered by the court below based upon the case of Morrissey v. Brewer, 408 U.S. 471 (1972), which involved an analagous parole revocation. Availability of counsel was also deemed necessary by the court because of the disabilities which accompany the mentally ill.

The opinion of the court below merely followed the direction of this Court as set down by its earlier decisions.

Counsel for the appellant has argued that the court below was bound by the holdings of Meachum v. Fano, 427 U.S. 215 (1976) and Montayne v. Haymes, 427 U.S. 236 (1976). These

cases are clearly inapplicable to the case at hand as they dealt with involuntary transfers from one prison to another, and did not treat the issue of the constitutionality of an involuntary transfer from a state prison to a state mental hospital. An involuntary transfer of a prisoner from a correctional complex to a state mental hospital is clearly distinguishable from an involuntary transfer from one prison to another. Even if the cases are remotely applicable, the case at hand clearly comes within the exception noted in Meachum, supra.

The thrust of the opinion below is also consistent with the opinions set forth in:

Baxstrom v. Herold, 383 U.S. 107 (1966).

U. S. ex rel. Schuster v. Herold, 410 F.2d 1071 (2nd Cir. 1969).

Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1977).

even though the similar issues were resolved through an equal protection analysis.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as to not need further argument, and Appellee respectfully moves the Court to affirm the judgment entered in the cause

by the United States District Court for the District of Nebraska.

Respectfully submitted,

THOMAS A. WURTZ

University of Nebraska
College of Law
Lincoln, Nebraska
Tel: (402) 472-1263

Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee was served upon the appellant by mailing a true copy thereof to Mr. Melvin Kammerlohr, Assistant Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, first-class postage prepaid, on this 20 day of March, 1979.

Attorney for Appellee

MAR 26 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

—0—

No. 78-1155

—0—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—0—

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

—0—

MOTION OF APPELLEE TO AFFIRM THE JUDGMENT BELOW FOR WANT OF A SUBSTANTIAL QUESTION

—0—

Thomas A. Wurtz
University of Nebraska
College of Law
Lincoln, Nebraska 68583
Tel: (402) 472-1263
Attorney for Appellees

TABLE OF CONTENTS

Pages

Motion to Affirm . . . . . .

State Statute and Nature of the Case . . . . . .

Argument . . . . . .

Conclusion . . . . . .

CASES CITED

Baxstrom v. Herold, 383 U.S. 107 (1966) . . . . . .

Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1977) . . . .

Matthews v. Eldridge, 424 U.S. 319 (1976) . . . . . .

Meachum v. Fano, 427 U.S. 215 (1976) . . . . . .

Montayne v. Haymes, 427 U.S. 236 (1976) . . . . . .

Morrissey v. Brewer, 408 U.S. 471 (1972) . . . . . .

Schuster v. Herold, 410 F.2d 1071 (1969) . . . . . .

Vitek v. Miller, 436 U.S. 407 (1978) . . . . . .

STATUTES CITED

Neb. Rev. Stat. § 83-180(1) (Reissue 1976) . . . . . .

CONSTITUTION CITED

Constitution of the United States, Fourteenth Amendment .

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

—0—

No. 78-1155

—0—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—0—

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

—0—

MOTION TO AFFIRM

—0—

The Appellee moves the Court to affirm the judgment of the court below, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

—0—

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

This appeal raises the question of the constitutionality of Neb. Rev. Stat. § 83-180(1) (Reissue 1976) as applied to the plaintiff-intervenor Larry D. Jones.

The statute provides for the involuntary transfers of persons sentenced to the Department of Correctional Services to a term of years, to the Lincoln Regional Center, a mental hospital, not within the Department of Correctional Services, but within Department of Public Institutions. The statute provides for such involuntary transfers without any formal notice or hearing or any other safeguard, other than determinations by one or more psychiatrists that the persons suffer from a mental disease or defect, and could not be given proper treatment within the Department of Correctional Services.

The appellants had previously appealed from the decision of a three-judge court of the United States District Court for the District of Nebraska entered on October 14, 1977, declaring Neb. Rev. Stat. § 83-180(1) to be unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. On May 23, 1978, this Court vacated the judgment entered October 14, 1977, and remanded the case for consideration of the question of mootness (Vitek v. Miller, 436 U.S. 407, 98 S.Ct. 2276, 56 L. Ed.2d 381).

On October 27, 1978, the district court entered a Memorandum of Decision that the case was not moot and reinstated the same judgment as was previously vacated. Appellants again filed notice of appeal on November 21, 1978. On January 8, 1979, Larry Jones, Appellee, had his limited parole revoked by the Board of Parole of the State of Nebraska, and presently remains confined in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

———0———

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

The Fourteenth Amendment to the Constitution of the United States forbids any state to "deprive any person of . . . liberty . . . without due process of law."

The court below, in recognizing that due process is a flexible concept, chose to use the analytical framework set out by this Court in the case of Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976) which suggested:

> ". . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail. See, e.g., Goldberg v. Kelly, supra, at 263-271."

The court below closely evaluated plaintiff's private interest of his avoidance of being stigmatized and labeled mentally ill, and his avoidance of a more controlled confinement, which would include behavior modification through the use of drugs. The court felt the risk of an erroneous deprivation of these private interests to be high. After balancing these and the state's interest the court merely made a factual determination that the involuntary transfer in question was tantamount to a major change in the plaintiff's condition of confinement which amounted to a grievous loss. Clearly, the plaintiff has a protected liberty interest in the avoidance of being stigmatized mentally ill, and subjected to chemotherapy and behavior modification programs. Due process, therefore, attached to the plaintiff's liberty interest.

Minimal due process requirements were then ordered by the court below based upon the case of Morrissey v. Brewer, 408 U.S. 471 (1972), which involved an analagous parole revocation. Availability of counsel was also deemed necessary by the court because of the disabilities which accompany the mentally ill.

The opinion of the court below merely followed the direction of this Court as set down by its earlier decisions.

Counsel for the appellant has argued that the court below was bound by the holdings of Meachum v. Fano, 427 U.S. 215 (1976) and Montayne v. Haymes, 427 U.S. 236 (1976). These

cases are clearly inapplicable to the case at hand as they dealt with involuntary transfers from one prison to another, and did not treat the issue of the constitutionality of an involuntary transfer from a state prison to a state mental hospital. An involuntary transfer of a prisoner from a correctional complex to a state mental hospital is clearly distinguishable from an involuntary transfer from one prison to another. Even if the cases are remotely applicable, the case at hand clearly comes within the exception noted in Meachum, supra.

The thrust of the opinion below is also consistent with the opinions set forth in:

Baxstrom v. Herold, 383 U.S. 107 (1966).

U. S. ex rel. Schuster v. Herold, 410 F.2d 1071 (2nd Cir. 1969).

Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1977).

even though the similar issues were resolved through an equal protection analysis.

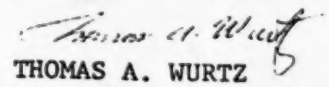
III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as to not need further argument, and Appellee respectfully moves the Court to affirm the judgment entered in the cause

by the United States District Court for the District of Nebraska.

Respectfully submitted,



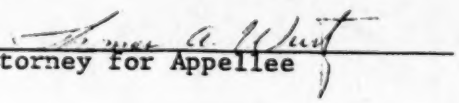
THOMAS A. WURTZ

University of Nebraska
College of Law
Lincoln, Nebraska
Tel: (402) 472-1263

Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee was served upon the appellant by mailing a true copy thereof to Mr. Melvin Kammerlohr, Assistant Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, first-class postage prepaid, on this 30 day of March, 1979.



Attorney for Appellee

Supreme Court, U. S.
FILED
JUN 2 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

LARRY D. JONES,

Appellee.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

BRIEF OF THE APPELLANTS

PAUL L. DOUGLAS
Attorney General of Nebraska

MELVIN KENT KAMMERLOHR
Assistant Attorney General
State of Nebraska

2115 State Capitol
Lincoln, NE 68509
Tel. (402) 471-2682

Attorneys for Appellants.

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

	Pages
Opinion Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Questions Presented for Review	10
Statement of the Case	11
Summary of the Argument	15
Argument:	
I. The only conditions for transfer, if any, in the statute in question, are the findings to be made by the physician or psychologist.	18
II. The responsibility for the determination of the need for medical care is properly placed in health care professionals.	22
Conclusion	32

CASES CITED

Addington v. Texas, — U. S. —, 39 CCH S. Ct. Bull. p. B2270	28
Baxtrom v. Herold, 383 U. S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760	31, 32
Cooper v. Pate, 378 U. S. 546, 12 L. Ed. 2d 1030, 84 S. Ct. 1733	29
Enomoto v. Wright (Aff. w/o opinion February 21, 1978, — U. S. —, U. S. L. W. 3513)	21

CASES CITED—Continued

Pages

Gagnon v. Scarpelli, 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 ..... 19, 20, 30

Humphrey v. Cady, 405 U. S. 504, 31 L. Ed. 2d 394, 92 S. Ct. 1048 ..... 31, 32

Meachum v. Fano, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 ..... 15, 16, 18, 19, 20, 21, 22, 23

Montanye v. Haymes, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 ..... 15, 16, 18, 19, 20, 21, 22

Morrissey v. Brewer, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 ..... 14, 19, 20, 30

Vitek v. Miller, 436 U. S. 407, 98 S. Ct. 2276, 56 L. Ed. 2d 381 ..... 2, 14

Wolff v. McDonnell, 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 ..... 14, 19, 20, 21, 30

STATUTES CITED

28 U. S. C. § 1253 2

28 U. S. C. § 1343 (3) and (4) 2, 11

28 U. S. C. § 2201 ..... 2, 11

28 U. S. C. § 2202 ..... 2, 11

28 U. S. C. § 2281, repealed by Public Law 94-381, Sec. 2, 90 Stat. 1119 2

42 U. S. C. § 1983 ..... 2, 11

Neb. Rev. Stat. § 81-101 (Reissue 1976) 8, 12

STATUTES CITED—Continued

Pages

Neb. Rev. Stat. § 81-102 (Reissue 1976) 9, 12

Neb. Rev. Stat. § 83-173 (Reissue 1976) 4, 13

Neb. Rev. Stat. § 83-176 (Reissue 1976) 6, 13

Neb. Rev. Stat. § 83-179 (Reissue 1976) 7, 13

Neb. Rev. Stat. § 83-180 (Reissue 1976) 2, 7, 12, 13, 14, 15, 16, 22, 27, 32, 33

CONSTITUTION CITED

Constitution of the United States, Fourteenth Amendment 2, 3, 10, 13

TEXTS CITED

National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, released in 1973 ..... 24, 25

Commission on Accreditation for Corrections of the American Correctional Assoc., *Manual of Standards for Adult Correctional Institutions.* August 1977, Standards for Medical and Health Care Services nos. 4275 and 4277 ..... 25, 26

In The

Supreme Court of the United States

October Term 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

LARRY D. JONES,

Appellee.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

BRIEF OF THE APPELLANTS

OPINION BELOW

The original opinion of the United States District Court for the District of Nebraska is reported in 437 F. Supp. 569; the re-entry of the original judgment is unreported.

JURISDICTION

This is a civil rights action brought pursuant to 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3) and (4), and 28 U. S. C. §§ 2201 and 2202 for declaratory relief that Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) is unconstitutional under the Fourteenth Amendment to the Constitution of the United States and attendant injunctive relief.

A three-judge district court was convened below pursuant to 28 U. S. C. § 2281, which was repealed by Public Law 94-381, Sec. 2, 90 Stat. 1119 but which repeal was not applicable to any action commenced on or before August 12, 1976. The present action was commenced on November 12, 1975.

Probable jurisdiction was first noted by this Court on February 21, 1978 and oral argument was had in this Court on April 24, 1978.

On May 23, 1978 this Court vacated the judgment entered October 14, 1977 and remanded the case to the District Court for consideration of the question of mootness (*Vitek v. Miller,* 436 U. S. 407, 98 S. Ct. 2276, 56 L. Ed. 2d 381.)

On October 27, 1978 the District Court entered a Memorandum of Decision that the case was not moot and re-entered the same judgment as the one previously vacated.

Jurisdiction to review by direct appeal the judgment of the United States District Court is conferred by 28 U. S. C. § 1253.

Notice of Appeal was filed in the United States District Court for the District of Nebraska on November 21, 1978, to the final judgment sought to be reviewed entered October 27, 1978.

Appeal was docketed in the United States Supreme Court on January 22, 1979. Review was granted April 23, 1979.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) United States Constitution, Fourteenth Amendment

[ARTICLE XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one

years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(2) Neb. Rev. Stat. § 83-173 (Reissue 1976)

The Director of Correctional Services shall:

(1) Supervise and be responsible for the administration of the Department of Correctional Services;

(2) Establish, consolidate, or abolish any administrative subdivision within the department and appoint and remove for cause the heads thereof, and delegate appropriate powers and duties to them;

(3) Establish and administer policies and programs for the operation of the facilities in the department and for the custody, control, safety, correction and rehabilitation of persons committed to the department;

(4) Appoint and remove the chief executive officer of each facility and delegate appropriate powers and duties to him;

(5) Appoint and remove employees of the department and delegate appropriate powers and duties to them;

(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the department, the administration of facilities, and the conduct of officers and employees under his jurisdiction;

(7) Designate the place of confinement of persons committed to the department subject to the provisions of section 83-176;

(8) Collect, develop and maintain statistical information concerning persons committed to the department, sentencing practices and correctional treatment as may be useful in penological research or in the development of treatment programs;

(9) Provide training programs designed to equip employees for duty in the facilities and related services of the department and to raise and maintain the educational standards and the level of performance of such employees;

(10) Transmit annually to the Governor and the Director of Public Institutions a report of the operations of the department for the preceding cal-

endar year, which report shall be transmitted by the Governor to the Legislature; and

(11) Exercise all powers and perform all duties necessary and proper in carrying out his responsibilities.

(3) Neb. Rev. Stat. § 83-176 (Reissue 1976)

(1) Whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the department.

(2) The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women, or any other facility designed primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities. The determination as to whether the minor is a serious threat to safety shall be made only after juvenile court hearing in the court of original disposition, at which the minor shall have the right to be represented by counsel.

(4) Neb. Rev. Stat. § 83-179 (Reissue 1976)

Upon his initial admission to a facility, each person committed to the department shall be given a physical examination and a thorough evaluation. He shall be kept apart from other persons committed to the department until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

(5) Neb. Rev. Stat. § 83-180 (Reissue 1976)

(1) When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

(2) When the physician or psychologist designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in, such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Department of Correctional Services, and shall be returned to the department when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

(3) When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

(6) Neb. Rev. Stat. § 81-101 (Reissue 1976)

The civil administration of the laws of the state is vested in the Governor. For the purpose of aiding the Governor in the execution and administration of the laws, the executive and administrative work shall be divided into the following departments: (1) Department of Agriculture; (2) Department of Labor;

(3) Department of Health; (4) Department of Roads; (5) Department of Water Resources; (6) Department of Banking and Finance; (7) Department of Insurance; (8) Department of Motor Vehicles; (9) Department of Public Welfare; (10) Department of Public Institutions; (11) Department of Administrative Services; (12) Department of Economic Development; and (13) Department of Correctional Services.

(7) Neb. Rev. Stat. § 81-102 (Reissue 1976)

The Governor shall appoint heads for the various departments, subject to confirmation by a majority vote of the members elected to the Legislature. Such appointments shall be submitted to the Legislature within sixty calendar days following the first Thursday after the first Tuesday in each odd-numbered year. The officers shall be designated as follows: (1) The Director of Agriculture for the Department of Agriculture; (2) the Commissioner of Labor for the Department of Labor; (3) the members of the State Board of Health for the Department of Health; (4) the Director-State Engineer for the Department of Roads; (5) the Director of Water Resources for the Department of Water Resources; (6) the Director of Banking and Finance for the Department of Banking and Finance; (7) the Director of Insurance for the Department of Insurance; (8) the Director of Motor Vehicles for the Department of Motor Vehicles; (9) the Director of Public Welfare for the Department of Public Welfare; (10) the Director of Public Institutions for the Department of Public Institutions; (11) the Director of Administrative Services for the Department of Administrative Services; (12) the Director of Correctional Services for the Department of Correctional Services; and (13) the Director of Economic Development for the Department of Economic Development. Whoever shall be so nominated by the Governor and shall fail to receive the number of votes requisite for confirmation, shall not be subject to

nomination or appointment for this or any other appointive state office requiring confirmation by the Legislature during the period for which his appointment was sought. In case of a vacancy in any of such offices during the recess of the Legislature, the Governor shall make a temporary appointment until the next meeting of the Legislature, when he shall nominate some person to fill such office. Any person so nominated who is confirmed by the Legislature, shall hold his office during the remainder of the term if a specific term has been provided by law, otherwise during the pleasure of the Governor subject to the provisions of this section; *Provided,* any such officers may be removed by the Governor pursuant to Article IV of the Constitution of Nebraska.

—o—

QUESTIONS PRESENTED FOR REVIEW

1. Whether a constitutionally convicted felon who has been sentenced to the Nebraska Department of Correctional Services has any process due prior to his transfer from the penitentiary, to which he has been assigned within said department, to a mental hospital within the Department of Public Institutions of the State of Nebraska, when confinement in said hospital is within the sentence imposed upon him?

2. If process is due under question 1, what procedures are required by the Fourteenth Amendment of the United States Constitution in these circumstances?

—o—

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U. S. C. § 1983, 28 U. S. C. § 1343(3) and (4), 28 U. S. C. § 2201 and 28 U. S.C. § 2202, in which Larry D. Jones intervened. It was decided by a three-judge court by judgment entered on October 14, 1977, pursuant to a Memorandum of Decision and order entered on September 12, 1977. The issues were found to be moot as to the plaintiffs other than Jones.

Prior to that, on August 2, 1976, defendants filed a motion for summary judgment (A. 25), which was denied by the court on August 24, 1976 (A. 26). Defendants' request for amendment of the order to permit an interlocutory appeal was denied (A. 31).

Plaintiff-intervenor, Larry D. Jones (appellee), was convicted of the crime of robbery and sentenced to the Department of Correctional Services of the State of Nebraska for a term of three to nine years from the District Court of Douglas County, Nebraska, which he commenced serving at the Nebraska Penal and Correctional Complex on or about May, 1974 (R. 73). He first began to serve his sentence by assignment to the reception-diagnostic center behind the walls of the Nebraska Penal Complex for a period of 30 days (R. 73). After that he went to the reformatory where he remained from June of 1974 to January of 1975 (R. 73, 74). He was then transferred to the Penal Complex penitentiary hospital and two days later to the adjustment center of the Nebraska Penal Complex. While there, he set his mattress on fire and was badly burned. He was transferred from the Nebraska Penal Complex by ambulance to St.

Elizabeth's Hospital, burn unit, a hospital in the City of Lincoln, where he remained for about four or five months (R. 75, 112, 113). From the St. Elizabeth's Hospital he was involuntarily transferred after findings by physicians in compliance with Neb. Rev. Stat. § 83-180(1) (Reissue 1976), *supra*, to the security unit of the Lincoln Regional Center (R. 76-78). The Lincoln Regional Center is under the Department of Public Institutions while the Nebraska Penal Complex is under the Department of Correctional Services. Both are executive departments of the State of Nebraska (Neb. Rev. Stat. § 81-101 (Reissue 1976)). The directors of both departments are appointed by the Governor of the State of Nebraska (R. 58), (Neb. Rev. Stat. § 81-102 (Reissue 1976)).

Neb. Rev. Stat. § 83-180 (Reissue 1976), provides in part that if the physician or psychologist designated by the Director of Correctional Services finds that a person suffering from a mental disease or defect cannot be given proper treatment in a facility of the department, the director may arrange for his transfer for examination, study and treatment to any medical correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to expiration of his sentence, treatment in such facility is no longer necessary.

In addition to Neb. Rev. Stat. § 83-180 (Reissue 1976), *supra*, other statutes of Nebraska also provide that:

(1) The Director of the Department of Correctional Services shall designate the place of confinement of persons committed to the department (Neb. Rev. Stat. § 83-173 (Reissue 1976)).

(2) Whenever a person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden, he shall be deemed to be sentenced to the department. The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another (Neb. Rev. Stat. § 83-176 (Reissue 1976)).

(3) Upon his initial admission to the facility each person committed to the department shall be given a thorough evaluation, including physical, psychological, social, educational and vocational. A report shall be made including recommendations regarding the facility to which such person should be assigned and the program of treatment for his rehabilitation, including medical and psychological treatment (Neb. Rev. Stat. § 83-179 (Reissue 1976)).

The said Larry D. Jones intervened in the present action alleging that Neb. Rev. Stat. § 83-179 (Reissue 1976) and Neb. Rev. Stat. § 83-180 (Reissue 1976), *supra*, are unconstitutional on their face and as applied by the defendants because, among other things, they deprive intervening plaintiff of due process of law in violation of the Fourteenth Amendment to the United States Constitution (A. 23).

That the conditions of confinement or the facilities of the Lincoln Regional Center security unit, or any other facilities here involved, were in themselves unconstitutional has never been an issue in this case nor been so determined. The three judge court however, decreed:

> That Neb. Rev. Stat. § 83-180(1) (Reissue 1976), *supra*, is unconstitutional as applied to the plaintiffs in that it denied the plaintiffs due process of law; that defendants (appellants) are enjoined from transferring plaintiff-intervenor Larry D. Jones, at any time before his complete discharge from the custody of the State of Nebraska on the criminal charge he is now serving, from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except by a procedure which includes substantially the same elements as provided by this court in *Morrissey v. Brewer*, 408 U. S. 472 (1972), and *Wolff v. McDonnell*, 418 U. S. 539 (1974), except for the addition that the state must also furnish legal counsel if the inmate is financially unable to furnish his own and the state must give effective and timely notice of all the foregoing rights. (Jurisdictional Statement, App. 18-20).

While this case was on Appeal to the U. S. Supreme Court the first time, Larry D. Jones was granted a limited parole to receive in-patient treatment at a V. A. hospital in Danville, Ill. In light of this the U. S. Supreme Court remanded the case to the U. S. District Court for consideration of the question of mootness. (*Vitek v. Miller*, 436 U. S. 407, 98 S. Ct. 2276, 56 L. Ed. 2d 381.) On October 27, 1978, the three-judge district court found the case was not moot (Jurisdictional Statement Appendix A). Larry D. Jones is now back in the confines of the Nebraska Penal and Correctional Complex having been arrested in Arizona in November 1978, on a Parole Board Warrant issued October 4,

1978. His parole was revoked by the Nebraska Parole Board after a final hearing on January 8, 1979 (Jurisdictional Statement App. Ex. H).

—o—

SUMMARY OF THE ARGUMENT

I.

The three-judge court found the transfers to come within an exception to *Meachum v. Fano*, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532, and *Montanye v. Haymes*, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 543, because of a state statute which it said gave the inmate a reasonable expectation that he would not be transferred "except when the inmate suffers from a mental disease or defect and that it cannot be adequately treated at the Penal Complex." (Memorandum of Decision, Jurisdictional Statement, App. 4, 7).

The statute did not so state. The statute states, in this regard, "If the physician or psychologist is of the opinion that the person (found by the physician or psychologist to suffer a mental disease or defect) cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study and treatment. . . ." Neb. Rev. Stat. § 83-180 (Reissue 1976).

There was never any claim that the statute was not followed. Therefore, any right the inmate had by virtue of the statute was given to him.

The court did not find that the transfer was not within the prison system or that the conditions to which plaintiffs were transferred were otherwise unconstitutional.

Therefore, the exception or "specified conditions" of *Meachum* and *Montanye* were not alleged to have been violated, leaving the transfers within the holdings of those cases. The defendants motion for summary judgment should therefore have been sustained.

The situation here is different in two respects from this court's holdings in other cases that a due process proceeding was necessary before a state conferred right could be removed.

1. The method of determining the facts upon which removal of the right hinged was left open when the state conferred the right in those cases; here it was not.

2. The method of determining misconduct—the trigger in those cases, should logically be different from the method of determining the availability and need for examination, study and treatment of mental illness.

II.

The examination, study and diagnosis of illnesses, whether mental or physical, are an integral part of prison life and the transfer from a prison to a mental hospital should be treated the same as transfers between correctional institutions in *Meachum v. Fano* and *Montanye v. Haymes*. Because of the Nebraska statute, Neb. Rev. Stat. § 83-180 (Reissue 1976), the officials do not have absolute discretion to make such transfers as in *Meachum* and *Montayne*. However, because of the nature of the determination to be made, that a transfer, if made, is for examination and study as well as treatment, the provision of the statute placing the responsibility upon a health care professional to make the determination whether the inmate

can be given proper treatment where he is or should be transferred for examination, study and treatment is reasonable and proper. If the district court, by setting up its own procedures, was in effect holding that the Nebraska statutory method was improper, we vigorously disagree.

Because of the great variety of both physical and mental health services throughout the United States as to the availability, quality and other considerations and the expertise necessary in diagnosis and selection, the provision in the Nebraska statute for placing the responsibility for the initial determination is not unreasonably placed in the hands of the health care professional.

The type of due process hearing which is proper for determining misconduct is ill-suited, cumbersome, time-consuming and expensive for the determination of whether an inmate should be moved for further study and diagnosis for mental illness or related medical problems.

If problems arise in regard to the programs or services received, they can more directly and logically be attacked by an action to test the constitutionality of the conditions and to seek suitable relief rather than a blanket procedure which has no relationship to the quality or type of programs involved or available in various parts of the country.

The Nebraska statute in question specifically provides for the use of the civil procedures applicable to all citizens if an inmate is to be placed in a mental institution after the expiration of his prison sentence and thus no equal protection issue is involved.

———o———

ARGUMENT

I.

The only conditions for transfer, if any, in the statute in question are the findings to be made by the physician or psychologist.

The three-judge court in the present case founded its decision that process was due on its interpretation of the Nebraska statute which it held to be unconstitutional and its finding that the prison penal authorities followed this statute.

The three-judge court began by quoting from *Montanye v. Haymes*, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543, the following:

> "We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other *specified events.*" (Emphasis added.)

The three-judge court then distinguished the Nebraska statute on transfers to the Lincoln Regional Center concluding that:

> " . . . , there was an objective expectation, firmly fixed in state law and official Penal Complex practice, that a transfer would not occur except when the inmate suffers from a mental disease or defect and that it cannot be adequately treated at the Penal Complex. . . . " (Jurisdictional Statement, App. 7-8).

The three-judge court ignored the fact that the statute and the practice thereunder required the findings to be

made by a physician or psychologist designated by the director and not by some unnamed person or body. Therefore, the inmate, instead of having a justifiable expectation rooted in state law that he will not be transferred, as stated by the district court, clearly had an expectation that he may be transferred if the physician or psychologist, not some unnamed person or body, found that he suffered from a mental disease or defect not properly treatable in the facility he was presently in.

There is just no logical way that it can be said that a Nebraska penal inmate has an objective expectation that a transfer would not occur until after a due process hearing when the statute specificially states that a transfer may occur when the stated findings are made by a physician or psychologist—clearly the "specified events" when he may expect to be transferred as stated in the quote above from *Meachum.*

Nor is the situation here in any way akin, so far as taking away a due process clause liberty interest, to *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (parole), *Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (probation), or *Wolff v. McDonnell*, 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (good time), all of which were based upon the taking away of a positive grant of liberty affirmatively conferred by state law. The liberty interests, unlike *Meachum* and *Montanye* were not extinguished by the conviction but acquired independently thereof. In *Morrissey v. Brewer* this court found that:

> " . . . Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confine-

ment in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. . . . " *Morrissey v. Brewer*, 408 U. S. 471 at 482.

No similar comparison could be made in this case.

In *Gagnon v. Scarpelli* this court could not perceive any relevant differences to the guarantee of due process between the revocation of parole and the revocation of probation and found that:

" . . . Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. . . ." *Gagnon v. Scarpelli*, 411 U. S. 778 at 782.

In *Wolff v. McDonnell* the statutory grant of good time credit was found to be a liberty interest with real substance which the Nebraska statute specifically provided could not be taken away except in cases of flagrant or serious misconduct—thus a liberty interest firmly grounded in state law. The statute did not provide how the factual finding as to serious misconduct would be made, hence the due process hearing. Had the statute provided a fact finding procedure, the court might have concluded that no further process was due; in any case, as argued infra, there is a significant difference between the qualifications desirable for ascertainment of medical facts as opposed to the facts of misconduct.

The distinction, between the *Meachum-Montanye* transfers on the one side, and the part of *Wolff v. McDonnell* relating to disciplinary cells and the recent case of *Enomoto v. Wright* (Aff. w/o opinion February 21, 1978, — U. S. —, U. S. L. W. 3513), regarding administrative segregation, on the other side, is not as fine as may appear at first reading.

In both *Meachum* and *Montanye* this court emphasized that where the prison officials had discretion to transfer within the system, or could transfer for no reason at all, that the due process clause was not triggered even if the transfer was for disciplinary purposes or labeled as punitive. However, in both *Wolff v. McDonnell* and *Enomoto v. Wright*, the transfer could only be made for specific grounds set forth in a state statute or state administrative rule. In *Wolff* the same statute relating to revocation of good time applied to placement in a disciplinary cell, i. e. only for flagrant or serious misconduct. In *Enomoto* the administrative segregation could only be made for medical, psychiatric, disciplinary or administrative reasons which had to be clearly documented at the time the action was taken. Thus in both the latter two cases there were factual determinations required before the transfer and the method of determining the factual requirements was left open by the state law conferring the right.

Appellants in the present case could reasonably argue that other Nebraska statutes give the Director of Corrections the discretion to transfer to a mental hospital for no reason at all and that therefore, even if the statute in question requires the findings therein set forth that the director is not limited thereby. However, we do not wish, nor do we feel it is necessary, to place the transfer on such a narrow ground. We are willing to place the transfer

upon the findings required by the section in question; our only difference with the three-judge court is that the statute (and therefore any right of the inmate which is grounded in state law) ties the findings to the physician or psychologist and that such a procedure, as argued later, is reasonable and proper. That any right the inmate has because of such statute is clearly stated and conferred and cannot be separated; that the three judge court erred in changing that right from requiring the necessary findings to be made by the physician or the psychiatrist to such findings being required to be made by court designated procedures. (The district court did not hold that the mental hospital was not part of the penal system. Memorandum of Decision, Jurisdictional Statement, App. 7.)

Accordingly, since the complaints herein (A. 3, A. 18) only claim that the statute, section 83-180, *supra*, is unconstitutional on its face and that defendants followed this statute in practice, the motion for summary judgment (A. 25) filed by the defendants should have been sustained.

II.

The responsibility for the determination of the need for medical care is properly placed in health care professionals.

The only discernible difference between the present case (besides the necessary physician or psychologist findings) and *Meachum* and *Montanye* is that the transfer in the present case was to a state mental hospital authorized for use by the state correctional statutes, while in the foregoing cases the transfers were to nonhospital correctional facilities. Appellants respectfully contend that this

is a difference without legal substance so long as the hospital facilities are not otherwise violative of the Constitution and are within the state system contemplated by the criminal sentence.

Apparently the district court agreed that there was no legal significance in the difference in facilities, stating in its memorandum of decision:

> "The plaintiffs here were not transferred from one 'prison' to another but from a prison to a state mental hospital for both a continuation of their prison terms and for mental treatment. The prison and the hospital properly may be equated for due process purposes. . . . " (Jurisdictional Statement, App. 7).

In *Meachum v. Fano*, 427 U. S. 215 at 224, 49 L. Ed. 2d 451, 96 S. Ct. 2532, this court clearly set out the reasons underlying the constitutionality of transfers by emphasizing that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the constitution." In the same case the court went on to point out that the Constitution does not guarantee that a convicted prisoner will be placed in any one particular prison if the state has more than one correctional institution; that the conviction has sufficiently extinguished the defendant's liberty interest to empower the state to confine him in any of its prisons or to transfer him from one institution to another within the state prison system.

So far as we know, neither this court nor any recognized authority on corrections, has ever stated that a prison or correctional facility must or must not have hos-

pital or medical facilities including mental health facilities at any particular location. (Appellee Jones while in the Nebraska Penal and Correctional Complex received medical treatment from a psychiatrist while he was in the reformatory unit (R. 79), and at the prison hospital in the penitentiary unit (R. 99), which housed both psychiatric and medical patients (R. 157), and treatment for burns at St. Elizabeth's Hospital in Lincoln (R. 75) before he was transferred to the mental hospital.)

We assume that the programs available in the various correctional institutions throughout the United States are considerably varied in kind and degree. Undoubtedly some offer more in the way of recreational, manual training, or academic programs than others. Probably some provide relatively complete medical services within the institution while others must contract with outside physicians and hospitals for all or nearly all. The same as to availability and variety of programs is undoubtedly true as to mental health facilities.

The National Advisory Commission on Criminal Justice Standards and Goals in its volume, *Corrections*, released in 1973, in discussing these problems, stated in part as follows:

> "3. Each correctional agency should provide for the psychiatric treatment of emotionally disturbed offenders. Psychotic offenders should be transferred to mental health facilities. Correctional institution treatment of the emotionally disturbed should be under the supervision and direction of psychiatrists."

The commentary thereof provides in part:

> "As psychiatric services for diagnostic purposes became available in some correctional systems, the

> response of the correctional systems was to transfer the most seriously disturbed offenders to mental institutions. This decision was motivated by the fact that a large proportion of highly disturbed offenders were prone to violent and destructive behavior and highly oriented toward escape. However, as State mental hospitals developed 'open institutions,' they began to discourage admission of disturbed offenders for whom more secure facilities were required. . . .
>
> " . . . .
>
> "The correctional institution should not attempt to treat the psychotic but must persist in efforts to persuade mental health agencies to accept him for care and treatment. . . . " Standard 11.5 of the National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, 374, 376.

More recently, in August, 1977, the Commission on Accreditation for corrections of the American Correctional Association has published its *Manual of Standards for Adult Correctional Institutions*. The manual states that the commission not only promotes voluntary participation of correctional administrators and personnel in the accreditation process but also awards accreditation to correctional agencies and systems that demonstrate adherence to approved standards; the Commission on Accreditation will award accreditation to correctional systems for three or five years depending upon the extent of compliance with the standards.

In the section of Standards for Medical and Health Care Services is the following:

> **"4277 Written policy specifies that appropriate facilities are available for inmates who are diagnosed by qualified psychiatrists or psychologists as severely psychotic. (Essential)**

"DISCUSSION: Psychotic inmates should be transferred to mental health institutions. However, many state mental hospitals are becoming more open and are resisting the admission of disturbed inmates for whom secure housing is required. Partly in response to this, state correctional systems have begun to develop their own psychiatric facilities. Whatever system prevails, psychotic inmates should be transferred to a facility that can treat them effectively and assure public safety. These facilities must be under the supervision of mental health personnel and operated according to the standards and procedures of the psychiatric field."

As to emotionally disturbed inmates, Standard 4275 recognizes that emotionally disturbed inmates may be violent or destructive or prone to escape. It recommends that severely psychotic inmates should be transferred to state hospitals and less disturbed inmates should be retained in the general population where possible, provided treatment programs supervised by competent mental health professionals utilizing the least coercion necessary are available.

The foregoing standards and recommendations clearly demonstrate that treatment for mental and emotional problems is a vital part of a prison. They also illustrate the futility and inappropriateness of requiring a due process hearing before a transfer for mental health services when no such hearing is required when the services are provided at the inmate's location. Enlarge the problem by including other logical health services and the impropriety of such a requirement becomes even more obvious. Such a weighted preference for in-house care ignoring completely the availability and quality of services as criteria would avail no one. Whether the question is the

advisability of surgery for a brain tumor, chemotherapy for cancer or treatment for mental illness, one of the main questions of the patient would be the same in each case—whether such treatment is necessary and proper? The inmate is entitled to reasonable medical diagnosis in such regard and the Nebraska statute in question, section 83-180, makes specific provision for this interest. The section provides in part:

". . . If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for *examination, study, and treatment* to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. . . ." (Emphasis added.)

The last sentence of said section further provides that the inmate shall be returned when "treatment in such facility is no longer necessary." We can't assume that the doctors making such examination and study will provide unnecessary treatment and that they will not comply with the statute and fail to return the inmate when treatment is no longer necessary. This is the same standard we would expect for an inmate sent into a private hospital for a brain tumor or cancer diagnosis and treatment. As mentioned above, most persons would undoubtedly agree that the inmates' interests in such regard are better protected in most cases if he is transferred for another opinion before treatment is undertaken than if treatment is given, for any of the above examples, right in the prison. At any rate, it cannot be said that it is any worse. Logically, whether or not the inmate has had a hearing before a lay board should not make any difference to the examining

doctors on the receiving end in their determination as to what treatment, if any, is necessary.

In addition to the foregoing, considering that all inmates have a constitutional right to reasonable medical treatment, including mental health treatment, and the need to maintain order in the prisons, overburdensome procedures which could conceivably constitute roadblocks in their receiving treatment should not be instituted either. The opportunity for the best consultation as to the need and kind of medical services available should remain the prime objective and the use of professionals for referral to more professionals would seem to be a logical and reasonable accommodation to all interests.

In this respect, the statement by this court in the recent case of *Addington v. Texas,* — U. S. — (April 30, 1979), 39 CCH S. Ct. Bull. p. B2270 at B2282 concerning the quantum of proof necessary for civil commitment is apropos:

> "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for 'factfinding' is a 'reasonable medical certainty.' If a trained psychiatrist has difficulty with the categorical 'beyond a reasonable doubt' standard, the untrained lay juror—or indeed even a trained judge—who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. . . . "

This court then made the further observation which, if paraphrased to fit the circumstances of this case, would be equally appropriate; it stated:

> " . . . However, '[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' Patterson v. New York, 432 U. S. 197, 208 (1977). Nor should the state be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commiments.
>
> " . . . The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum. . . . "

Of course, it could be argued that absent any statute the right not to have mental health treatment, except when disturbance to other inmates and dangers to security are involved, is one of those residuums of liberty not extinguished by the due process conviction and sentence such as substantial religious freedom. *Cooper v. Pate,* 378 U. S. 546, 12 L. Ed. 2d 1030, 84 S. Ct. 1733 (1964). However, such an approach does not logically distinguish between the examples mentioned above such as a right not to receive cancer treatment or serious surgery. Even if there is considered to be such a residuum, the initial decision to refer a patient for study and examination to see whether

or not such treatment should be received is nevertheless better handled for all interests concerned by a medical health professional than by a proceeding before a lay committee.

In this regard we must strenuously disagree with the three judge court in its Memorandum of Decision contained in the Jurisdictional Statement, App. 4, at App. 9, where it sets forth how it arrived at the procedures it deemed required. While the court recognized that "the state's interest in placing a mentally ill person into the institution best equipped to treat him is strong and deserves primacy . . ." the court did nothing to follow through on this. The procedures for fact finding relating to violations, whether it be for revocation of parole, of probation, or good time, or for placement in a disciplinary cell, are particularly ill-suited to the question of transfer for medical or mental health reasons. The latter, requiring as they must, expert opinion evidence, the investment in time, expense and inconvenience in preparing for and conducting such hearings would seem to be way out of proportion to the result to be obtained when compared with the methods already suggested. The requirement by the district court wholly without precedent of appointment of legal counsel when an inmate is financially unable, in excess of the requirements of *Morrissey, Gagnon* and *Wolff,* dramatically illustrates the increase in money and activity which may be expected. It would seem that the emphasis should be upon the constitutionality of the conditions to which an inmate is to be subject, whether in a physical or mental health situation, rather than upon the procedures to place him there. An inmate, of course, retains his right to bring a civil rights action for unconstitutional conditions, for reasonable medical services and, under the Nebraska statute in question, to require transfer back to the correctional institution when treatment is no longer necessary.

As mentioned earlier, when the entire spectrum of mental health facilities in this country is considered, the emphasis upon the pre-transfer procedure rather than upon the constitutionality of the conditions either before or after a proposed transfer would appear to miss the mark in most cases.

Equal Protection Considerations.

Although the district court alluded to possible equal protection problems mentioning *Baxtrom v. Herold,* 383 U. S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760, we do not believe that said case is any authority or precedent to the present situation. As this court well knows, that case related to the procedures for the commitment of a prison inmate to a mental institution after his prison term expired. In *Humphrey v. Cady,* 405 U. S. 504, 31 L. Ed. 2d 394, 92 S. Ct. 1048, this court followed the *Baxtrom v. Herold* reasoning by holding that it applied to a claim that a five-year renewal of a sex deviate commitment after the expiration of his one-year maximum sentence stated a cause of action. In that same case this court emphasized:

> "Respondent seeks to justify the discrimination on the ground that commitment under the Sex Crimes Act is triggered by a criminal conviction; that such commitment is merely an alternative to penal sentencing; and consequently that it does not require the same procedural safeguards afforded in a civil commitment proceeding. That argument arguably has force with respect to an initial commitment under the Sex

Crimes Act, which is imposed in lieu of sentence, and is limited in duration to the maximum permissible sentence. . . ." *Humphrey v. Cady,* 405 U. S. 504 at 510, 511.

The problem raised in both *Baxtrom v. Herold* and *Humphrey v. Cady,* as to equal protection after the expiration of a prison sentence is specifically taken care of in the statute in question, § 83-180(3), *supra,* which provides:

> "When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the *civil commitment* and detention of persons suffering from such disease or defect." (Emphasis added.)

CONCLUSION

The appellants respectfully submit that Neb. Rev. Stat. § 83-180 (Reissue 1976), is a reasonable, proper and constitutional method of determining whether or not prison inmates should receive further examination, study and treatment in the location in which they are or another correctional facility housing medical services, or to another institution in the Department of Public Institutions where proper treatment is available; the district court found that the officials followed this statute. Appellants therefore respectfully submit that any constitutional right that

appellee Jones may have had which was not extinguished by his conviction and sentence, whether by virtue of § 83-180 or as a residuum retained, was satisfied by the findings of the professionals as required by said statute and that therefore appellants' motion for summary judgment should have been sustained. Appellants respectfully pray that the three judge district court for the District of Nebraska be reversed and the case remanded with instructions to enter an order sustaining the appellants' motion for summary judgment and dismissing the complaint of appellee Jones.

Respectfully submitted,

PAUL L. DOUGLAS
Attorney General of Nebraska

MELVIN KENT KAMMERLOHR
Assistant Attorney General
State of Nebraska

Attorneys for Appellants.

Supreme Court, U.S.
FILED
AUG 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

v.

LARRY D. JONES,

Appellee.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF OF THE APPELLEE LARRY D. JONES

THOMAS A. WURTZ
101 E. Broadway
Suite 303
Eugene, Oregon 97401
Tel. (503) 485-0203

Court-Appointed Attorney for Larry D. Jones

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

OPINION BELOW 1

ADDITIONAL STATUTES INVOLVED 2

QUESTIONS PRESENTED FOR REVIEW 7

STATEMENT OF THE CASE 7

SUMMARY OF THE ARGUMENT 12

ARGUMENT:

I. AN INVOLUNTARY TRANSFER OF A PRISONER FROM A CORRECTIONAL COMPLEX TO A STATE MENTAL HOSPITAL IS CLEARLY DISTINGUISHABLE FROM AN INVOLUNTARY TRANSFER FROM ONE PRISON TO ANOTHER 15

II. A PRISONER HAS A PROTECTED LIBERTY INTEREST IN THE AVOIDANCE OF BEING STIGMATIZED MENTALLY ILL AND SUBJECTED TO CHEMOTHERAPY AND BEHAVIOR MODIFICATION PROGRAMS 24

III. AN INMATE WHO IS TO BE INVOLUNTARILY TRANSFERRED TO A STATE MENTAL HOSPITAL MUST BE AFFORDED THE RIGHT TO COUNSEL IN ADDITION TO OTHER MINIMAL REQUIREMENTS OF DUE PROCESS 37

CONCLUSION 41

TABLE OF AUTHORITIES

Cases:

Addington v. Texas,
___ U.S. ___ 60 L.Ed. 2nd 323 (1979) 28

Baxstrom v. Herold,
383 U.S. 107 (1966) ..... *passim*

Chesney v. Adams,
377 F. Supp. 887 (D. Conn. 1974)..... *passim*

Doremus v. Farrell,
407 F. Supp. 509 (U.S.D.C. Neb. 1975) 19

Drope v. Missouri,
420 U.S. 162 (1975) 32

Enomoto v. Wright,
Aff. w/o opinion, 434 U.S. 1052 (1978) 22

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 21

Goldberg v. Kelly,
397 U.S. 254 (1970) 22

Greenwood v. U.S.,
350 U.S. 366 (1956) 32

Heryford v. Parker,
396 F.2d 393 (10th Cir. 1968) 39,40

In Re Ballay,
482 F.2d 648 (D.C. Cir. 1973)..... 28

In Re Gault,
387 U.S. 1 (1967) 26,39

Lessard v. Schmidt,
349 F. Supp. 1078 (E.D. Wisc. 1972).....39

Matthews v. Eldridge,
424 U.S. 319 (1976) 13,22

Matthews v. Hardy,
420 F.2d 607 (1969)..... 20,27,41

Meachum v. Fano,
427 U.S. 215 (1976) ..... *passim*

Montanye v. Haymes,
427 U.S. 236 (1976) 12,16,17,18,22

Morrissey v. Brewer,
408 U.S. 471 (1972) 21,24,25,38

O'Connor v. Donaldson,
422 U.S. 563 (1975) 14,25,32

Specht v. Patterson,
386 U.S. 605 (1967) 25,26

U.S. ex. rel. Schuster v. Herold,
410 F.2d 1071 (2nd Cir. 1969)..... *passim*

Vitek v. Miller,
436 U.S. 407 (1978) 11

Wolff v. McDonnell,
418 U.S. 539 (1974) 21,22,24,38

STATUTES

Mass. Gen. L. Annot. 97 (1974) 17

Neb. Rev. Stats. § §81-101-102 (Reissue 1976) 9

Neb. Rev. Stat. §83-180 (Reissue 1976)..... *passim*

Neb. Rev. Stat. §83-173 (Reissue 1976).....10

Neb. Rev. Stat. §83-176 (Reissue 1976)..... 10,19,25

Neb. Rev. Stats. § §83-1001-1078 (Cum. Supp. 1976)..... 2-7,19,41

CONSTITUTION

Constitution of the United States, Fourteenth Amendment 24

TEXTS

Commission on Accreditation for Corrections of the American Correctional Assoc., *Manual of Standards for Adult Correctional Institutions,* August 1977, Standards for Medical and Health Care Services Nos. 4275 and 4277..... 33,34

Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1974) 32,33

Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977) 25

National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 2.13, 16.12 ..... *passim*

The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 86-104 (1976) 25

Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445 (1977) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

v.

LARRY D. JONES,

Appellee.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF OF THE APPELLEE LARRY D. JONES

OPINION BELOW

The opinion of the United States District Court for the District of Nebraska is reported in 437 F. Supp. 569, (1977).

The re-entry of the original judgment on October 27, 1978 is unreported.

ADDITIONAL STATUTES INVOLVED

The Nebraska Mental Health Commitment Act

Neb. Rev. Stats. §§83-1001-1078 (Cum. Supp. 1976)

83-1001. Declaration of purposes.
83-1002. Sections; terms defined.
83-1003. County attorney; defined.
83-1004. Mental health board; defined.
83-1005. Director; defined.
83-1006. Mental health center; defined.
83-1007. State hospital; defined.
83-1008. Indigent; defined.
83-1009. Mentally ill dangerous person; defined.
83-1010. Mental health professional; defined.
83-1011. Peace officer; defined.
83-1012. Petitioner; defined.
83-1013. Sheriff; defined.
83-1014. Subject; defined.
83-1015. Jail; defined.
83-1016. Clerk of the district court; duties relating to mental health board.
83-1017. Mental health board for each country; created; powers.
83-1018. Mental health board; members; terms; qualifications; vacancy; alternate members; quorum; chairperson.
83-1019. Facility or programs for treatment of mental illness; voluntary admission; unconditional discharge; exception.

83-1020. Mentally ill dangerous person; custody prior to mental health board proceedings; where detained.
83-1021. Individual taken into custody; peace officer; execute certificate; contents.
83-1022. Mental health board proceedings; when commenced; petition; certificate; subject, notified of rights.
83-1023. Subject admitted by certificate; evaluated; decision; discharged from custody; when.
83-1024. Person believes another to be a mentally ill dangerous person; notify county attorney; petition; when.
83-1025. Petition; contents; filed; where; transfer of proceedings.
83-1026. Petition; verified; county attorney statement; emergency custody under certificate; effect; how entitled; dismissal; when.
83-1027. Petition; immediate custody not required, summons; final or preliminary hearing; sheriff; duties; failure to appear; warrant for custody.
83-1028. Petition; immediate custody required; warrant; sheriff to take subject into custody until hearing; duties.
83-1029. Subject admitted by warrant; evaluated; decision.
83-1030. Subject in custody by warrant; preliminary hearing; final hearing; when held.
83-1031. Final hearing; not held within five days; preliminary hearing; purpose; mental health board; duties.
83-1032. Mental health board; preliminary hearing;

subject not a mentally ill dangerous person; dismiss petition and discharge subject; subject is a mentally ill dangerous person; voluntary treatment alternative; when; procedure.
83-1033. Mental health board; preliminary hearing; subject is a mentally ill dangerous person; order; final hearing.
83-1034. Board; order subject retained in custody or released pending final hearing; when held.
83-1035. Final hearing; purpose; mental health board; duties.
83-1036. Final hearing; subject denies allegations of petition; proceedings; suspension of proceedings; voluntary treatment alternatives; procedure.
83-1037. Mental health board; final hearing; determination that subject is a mentally ill dangerous person; order of final disposition.
83-1038. Mental health board; final disposition; considerations.
83-1039. Subject in need of board ordered treatment; custody pending entry of an order of final disposition.
83-1040. Subject in need of board ordered treatment; determine best treatment disposition; predisposition investigation; report and recommendations; predisposition assistance; psychiatric and psychological evaluation.
83-1041. Subject in need of board ordered treatment; board; issue warrant; contents; commitment; when completed.
83-1042. Involuntary treatment requiring confinement; subject taken to facility; procedure.

83-1043. Final order of mental health board; appeal; final order of district court; appeal.
83-1044. Final order of disposition; designate individual to prepare and supervise an individualized treatment plan; contents; copy; filed.
83-1045. Person responsible for subject's individualized treatment plan; periodic progress reports; filed and served.
83-1046. Mental health board; order discharge or change treatment disposition; when.
83-1047. Rights subjects are entitled to during proceedings against them; sections enumerated.
83-1048. Subject's rights; written notice of the time and place of hearings; reasons alleged for board ordered treatment; procedure.
83-1049. Subject's rights; representation by counsel; appointment of counsel if indigent.
83-1050. Appointment of counsel; procedure.
83-1051. Appointed counsel; fees; reimbursement of costs incurred; procedure.
83-1052. Subject's rights; independent evaluation and assistance in proceedings; fee and expenses.
83-1053. Counsel for subject; rights, enumerated; discovery; appeal from denial of discovery; when.
83-1054. Continuances; liberally granted.
83-1055. Mental health board hearings; closed to public; exception; where conducted.
83-1056. Subject's rights; preliminary and final hearings; appeal in person and testify in own behalf; present witnesses and evidence.
83-1057. Subject's rights; compulsory process to obtain

testimony of witnesses.
83-1058. Subject's rights; preliminary and final hearings; confront and cross-examine adverse witnesses and evidence.
83-1059. Preliminary, final, and judicial hearings; rules of evidence applicable.
83-1060. Subject's rights; written statements; contents.
83-1061. Proceedings shall be of record; reporter; expenses and fees.
83-1062. Qualified mental health professional; provide medical treatment to subject; when.
83-1063. Subject acquitted of liability in criminal proceeding; use of evidence.
83-1064. Subject; waive rights; manner.
83-1065. Rights of subjects in custody or receiving treatment.
83-1066. Subjects in custody or receiving treatment; rights; enumerated.
83-1067. Subjects in custody or receiving treatment; waive or consent to denial of rights; manner.
83-1068. Subject's records; confidential; exceptions.
83-1069. Violations; penalty.
83-1070. State Board of Mental Health; created; members; qualifications; chairperson.
83-1071. State Board of Mental Health; compensation; expenses.
83-1072. State Board of Mental Health; provide rehearings for persons involuntarily committed; where held; when.
83-1073. Rehearings; three members present.
83-1074. State Board of Mental Health; rehearings; what considered; procedure.
83-1075. State Board of Mental Health; rehearing;

Attorney General; powers, duties, and responsibilities.
83-1076. State Board of Mental Health; determine if subject is indigent; provide for appointment of counsel.
83-1077. State Board of Mental Health; cease to exist; when.
83-1078. Act, how cited.

QUESTIONS PRESENTED FOR REVIEW

A. Whether a prisoner sentenced to the Department of Correctional Services, who has never been judicially determined to be mentally ill, may be involuntarily transferred to a state mental hospital under the Department of Public Institutions without the benefits of procedural due process, when such transfer will submit him to chemotherapy, behavior modification programs and the stigmatization of being labelled mentally ill.

B. Assuming process is due prisoners who are to be involuntarily transferred to state mental hospitals, does the unique nature of this transfer afford the accused the availability of legal counsel.

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343(3) and (4), 28 U.S.C. §2201 and 28 U.S.C. §2202. The action was originally brought by plaintiff Charles Miller and was certified as a class action on August 18, 1976. Following a hearing, the action was decertified, and Larry D. Jones, William George Foote, and

William McKinley Hines were added as individual plaintiff-intervenors on their motions. (Memorandum of Decision, Jurisdictional Statement, App. 4). Plaintiffs claimed that their involuntary transfers from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center pursuant to *Neb. Rev. Stat.* §83-180 were unconstitutional, in that the statutory scheme deprived them of due process of law and the equal protection of the laws (App. 10, 11, 12, 13, 21, 22, 23). Pursuant to a memorandum of decision and order entered on September 12, 1977, and a judgment entered on October 14, 1977, a three-judge court of the United States District Court for the District of Nebraska declared *Neb. Rev. Stat.* §83-180(1) to be unconstitutional in violation of the Due Process Clause of the fourteenth amendment to the United States Constitution. The court found lawsuit moot as to all plaintiffs and intervenors other than Larry D. Jones. (Memorandum of Decision, Jurisdictional Statement, App. 4)

Plaintiff-intervenor Larry D. Jones (appellee) was convicted of the crime of robbery and sentenced to the Nebraska Penal and Correctional Complex for a term of three to nine years from the District Court of Douglas County, Nebraska (App. 18, R.73). He began serving his sentence by assignment to the reception-diagnostic center at the Nebraska Penal and Correctional Complex for thirty days (R. 73). He was then transferred to the Nebraska State Reformatory, a division of the Nebraska Department of Correctional Services, where he remained from June of 1974 until January of 1975 (R.73, 74). He was then transferred to the Penal Complex penitentiary hospital and, after an incident, was transferred two days later to the area of solitary confinement known as the adjustment center (R. 74). While in the adjustment center, in an attempt to move himself to the

penitentiary hospital, he set his mattress on fire (R. 74, 75). While waiting for the guard to arrive he was severely burned, and he was transferred by ambulance from the Nebraska Penal Complex to St. Elizabeth's Hospital in the city of Lincoln, where he remained for about four or five months (R. 75, 112, 113). From the St. Elizabeth's Hospital he was involuntarily transferred pursuant to *Neb. Rev. Stat.* §83-180(1) to the security unit of the Lincoln Regional Center. (R. 76-78).

The Lincoln Regional Center is a state hospital operated by the Department of Public Institutions (App. 16, R. 58). Its purpose is for the treatment of the emotionally disburbed, mentally ill, mentally diseased, and those suffering from mental defects (App. 16). All prisoners that are voluntarily or involuntarily transferred from the Nebraska Penal and Correctional Complex and the Nebraska State Reformatory to the Lincoln Regional Center are confined at the security building, which is the institution's maximum security facility (App. 16, R. 37). The Nebraska Penal and Correctional Complex is under the Department of Correctional Services. Both the Department of Public Institutions and the Department of Correctional Services are executive departments of the State of Nebraska, and their directors are both appointed by the Governor of the State of Nebraska (R. 58, *Neb. Rev. Stats.* § §81-101-102 [Reissue 1976]).

The statute found unconstitutional by the lower court, *Neb. Rev. Stat.* §83-101(1), provides in part that if a physician or psychologist designated by the Director of Corrections finds that a person suffering from a mental disease or defect cannot be given proper treatment in the facility in which he is so confined, the person may be segregated from other persons in that facility. If the physician or psychologist is of the opinion that the person cannot be

given proper treatment in that facility, then the director may arrange for his transfer for examination, study, and treatment to any other medical-correctional facility or to another institution in the Department of Public Institutions where proper treatment is available.

Neb. Rev. Stat. §83-173 (Reissue 1976) (Reissue 1976) allows the Director of Correctional Services to designate the place of confinement of persons committed to that department.

Neb. Rev. Stat. §83-176 (Reissue 1976) provides that whenever a person is sentenced or committed to a specific facility within the Department of Correctional Services he shall be deemed to be sentenced to that department. The director may designate as a place of confinement any available and suitable institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another.

The lower court enjoined the defendants from transferring plaintiff-intervenor Larry D. Jones from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center until his complete discharge from the custody of the State of Nebraska on the criminal sentence he is now serving, except by a procedure which includes each of the following:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;
D. An independent decisionmaker;
E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and
G. Effective and timely notice of all the foregoing rights.

(Jurisdictional Statement, App. 12-13)

While this cause was on appeal to the United States Supreme Court, Larry D. Jones was granted a limited parole to receive in-patient psychiatric treatment at the Veterans Hospital in Danville, Illinois. In light of this fact, and the possibility that Jones might be voluntarily accepting psychiatric treatment, the United States Supreme Court remanded the case to the United States District Court for consideration of the question of mootness. (*Vitek v. Miller*, 436 U.S. 407, (1978)).

On October 27, 1978, a three-judge district court found the case was not moot, because Jones, although not presently incarcerated in a mental hospital, was subject to and under a threat of being transferred to one, pursuant to *Neb. Rev. Stat.* §83-180. (Jurisdictional Statement, Exhibit E, App. 20, 24) The court therefore entered an order reinstating the original judgment of the court. (Jurisdictional Statement, Exhibit D, App. 18)

Larry D. Jones, is presently residing in the Nebraska Penal and Correctional Complex having been arrested in Arizona in November of 1978, on a Parole Board Warrant issued October 4, 1978. His parole was revoked by the Nebraska Parole Board after a final hearing on January 8, 1979 (Jurisdictional Statement, Exhibit H, App. 32). He

does not reside in the psychiatric unit of the Nebraska Penal and Correctional Complex, nor is he receiving or accepting psychiatric treatment.

SUMMARY OF THE ARGUMENT

I.

An involuntary transfer of a prisoner from a correctional complex to a state mental hospital is clearly distinguishable from an involuntary transfer from one prison to another. The state has rested much of its case on the holdings of *Meachum v. Fano*, 427 U.S. 215 and *Montanye v. Haymes*, 427 U.S. 236. These cases are clearly distinguishable from the case at hand. *Meachum, supra*, involved the transfer of inmates from a medium security institution to a maximum security institution for disciplinary reasons. *Montanye, supra*, involved the transfer of an inmate from one maximum security unit to another. Here the plaintiff was transferred from a penal and correctional complex to a state mental hospital.

The plaintiff maintains that he possesses a protected liberty interest in not being arbitrarily transferred to a state mental hospital, and the uniqueness of the transfer alone makes it difficult to categorize within the limited framework of the *Meachum* and *Montanye* decisions. Assuming that the cases can be read so broadly as to encompass the factual situation at hand, it would clearly fall within the recognized exception in *Meachum*. The court below found there was an objective expectation rooted in state law and official prison practice, that such transfers would not occur except when an inmate becomes mentally ill and could not be treated at the prison. (Memorandum of Decision, Jurisdictional State-

ment, App. 7, 8). The state has argued that *Neb. Rev. Stat.* §83-180 (Reissue 1976) does not give the prisoner such an expectation rooted in state law. Yet the mere existence of a procedure outlined in the statute, found unconstitutional, does not guarantee that the procedure is not subject to constitutional challenge.

The transfer from a prison to a state mental hospital cannot be categorized as merely an administrative transfer. *Baxstrom v. Herold*, 383 U.S. 107; *U.S. ex rel. Schuster v. Herold*, 410 F.2d. 1071 (2nd Cir. 1971); *Chesney v. Adams*, 377 F.Supp. 887 (D. Conn. 1974). The stigma that attaches to those confined and labelled mentally ill and the use of mandatory behavior modification and chemotherapy are the most important factors why such transfers are not simply administrative.

Transfer to a mental hospital certainly involves the risk of a loss of liberty which is even more fundamental and greater than the loss of parole, good-time, probation, or transfer to solitary confinement.

The court below upon finding that due process attached to the plaintiff's liberty interest, properly used the analytical framework set out by this Court in *Matthews v. Eldridge*, 424 U.S. 19 (1976). The plaintiff's private interest was found to be the avoidance of a more controlled environment and being labelled mentally ill, which carries a distinctive stigma. The risk of an erroneous deprivation was relatively high because of the limited statutory safeguards.

The state failed to make a showing of how any additional hearing procedure would create an additional administrative or fiscal burden.

II.

The plaintiff clearly has a protected private liberty interest in the avoidance of being stigmatized mentally ill and subjected to chemotherapy and behavior modification programs. Even though a prisoner may give up some liberty when he is incarcerated pursuant to a valid conviction, an individual does possess a residuum of constitutionally protected liberty. This Court noted in *O'Connor v. Donaldson*, 422 U.S. 579, that involuntary confinement to a mental hospital is a deprivation of liberty to which due process attaches. This Court in *Baxstrom, supra*, and other courts in *Schuster* and *Chesney, supra*, would not have invalidated involuntary criminal commitment schemes using an equal protection analysis, had not a protected liberty existed. Courts have increasingly recognized that a stigma attaches to those confined in mental institutions, which follows a person throughout his life, regardless of the duration of the confinement. The court below properly recognized that a transfer to the Lincoln Regional Center resulted in greater limitation of freedom, had stigmatizing consequences, and, coupled with mandatory behavior modification, resulted in a major change of confinement tantamount to a grievous loss. (Memorandum of Decision, Jurisdictional Statement, App. 8).

The decision of the court below requiring minimal due process for transfer to a state mental hospital does not take medical decisions away from health professionals as is argued by the state. The hearings contemplated will undoubtedly involve the testimony of health professionals, whose credibility will be weighed by the trier of fact. Involuntary treatment for mental illness is also distinguishable from routine medical treatment because of the stigmatizing consequences and the uncertainties which accompany psychiatric diagnosis and therapy.

The National Advisory Commission on Criminal Justice Standards and Goals advocates detailed procedural safeguards for transfers between correctional and mental instituiuons. *Corrections,* Standards 2.13, 16.12.

III.

In addition to minimal due process requirements, an inmate involuntarily transferred to a state mental institution must be afforded the right to counsel because of the uniqueness of the disabilities which accompany the mentally ill. Unless an individual is able to comprehend, examine, evaluate, and challenge the process that he is afforded, it is of little or no consequence. As the lower court noted, a prisoner's rights unless known are rather illusionary. (Memorandum of Decision, Jurisdictional Statement, App. 12).

ARGUMENT

I.

AN INVOLUNTARY TRANSFER OF A PRISONER FROM A CORRECTIONAL COMPLEX TO A STATE MENTAL HOSPITAL IS CLEARLY DISTINGUISHABLE FROM AN INVOLUNTARY TRANSFER FROM ONE PRISON TO ANOTHER.

Larry D. Jones was involuntarily transferred from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, a state mental hospital. He had never been adjudged insane or incompetent by any court nor had he ever been brought before a mental health commitment board of the State of Nebraska or any state (R. 76). Once transferred he was forced to take Thorazine, his prescribed medication (R. 79). When he refused, he was injected with the medication, taken to a quiet room, and placed in waist restraints (R. 81). He was also placed on a behavior modification program, which was also involuntary (R. 89, 38-41). In all respects this was not a mere transfer from one part of a correctional system to another. The findings of the court below were in accord, ". . . Patients there, including inmates transferred from the Penal Complex, are frequently required to participate in behavior modification programs, and to take whatever medication may be prescribed for them. . . ." (Memorandum of Decision, Jurisdictional Statement, App. 6).

Appellants have rested much of their case on the decisions of *Meachum v. Fano,* 427 U.S. 215, and *Montanye v. Haymes,* 427 U.S. 236. The strict and limited holdings of the courts are found in *Montanye, supra* at 242:

> We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly conficted prison inmate is infringed when he is transferred from one *prison to another* within the state, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. [Emphasis added]

Both cases cited by the appellant in support of their claim that no due process violation existed in the instant case,

involved factual situations that are distinguishable from the case at hand. *Meachum* involved the transfer of inmates from a medium security institution to a maximum security institution as disciplinary action for setting fires. *Montanye,* the companion case, involved the transfer of an inmate from one maximum security correctional facility to another maximum security correctional facility in a different location, allegedly because the inmate had circulated a petition protesting his removal from a prison job. In the case now before this Court, we are faced with an entirely different transfer scheme, the transfer from a penal and correctional complex to a state mental hospital. The state transfer statute challenged in *Meachum* did not deal with transfers from a state prison to a state mental hospital but provided only that:

> §97 Transfers *From* and *To* Correctional Institutions.
>
> Approval.
>
> The Commissioner may transfer any sentenced prisoner from one *correctional institution* of the commonwealth to *another,* and with the approval of the sheriff of the county from any such institution except a prisoner serving a Life Sentence to any *jail* or *house of correction* or a sentenced prisoner from any *jail* or *house of correction* to any *such institution* except the state prison, or from any *jail* or *house of correction. . . . Mass. Gen. L. Annot.* §97 (1974) cited in *Meachum, supra.* p. 227 Foot. 7 [Emphasis added]

Clearly, the statute dealt only with transfers between correctional facilities. These cases might be controlling if an involuntary inmate transfer from the Nebraska State Reformatory to the Nebaska Penal and Correctional Complex were being challenged. The court below specifically found that, ". . . Inmates are not assigned to the Lincoln Regional

Center for any administrative or correctional purpose. . . ." (Memorandum Opinion, Jurisdictional Statement, App. 7).

It is our contention that the liberty interest a prisoner maintains from arbitrary transfer to a state mental hospital is so unique that it is difficult to categorize within the limited framework of the *Meachum* and *Montanye* decisions. To find the statute in question unconstitutional, we therefore do not feel it necessary to come within the recognized exceptions noted in these cases. But assuming arguendo that these opinions can be read so broadly, so as to encompass the factual situation in the case at hand, we would agree with the court below that a prisoner has a justifiable expectation rooted in state law and Penal Complex practice, that he will not be transferred to a state mental hospital unless he is mentally ill and cannot be adequately treated at the Penal Complex.

The court below found that the transfers to the Lincoln Regional Center were conditioned upon a finding that a prisoner suffered from a mental disease or defect and could not be adequately treated within the Penal Complex (R. 8, 9, 10) (Memorandum Opinion, Jurisdictional Statement App. 7). The court also went on to state that ". . . the statute under which the plaintiffs' transfers were made specifically so states. Furthermore, the evidence shows that the transfers to the Lincoln Regional Center are so conditioned in practice." (Memorandum of Opinion, Jurisdictional Statement App. 7).

Larry Jones clearly had an expectation firmly fixed in state law coupled with Penal Complex practice that he would not be transferred to a state mental hospital unless he became mentally ill, and he could not be treated at the Penal Complex. The fact that the statute helps give the prisoner the expectation rooted in state law that he will not be transferred

to a mental hospital unless mentally ill and could not be treated at the prison, does not exclude the possibility that the statute's procedure for transferring the prisoner is unconstitutional, for its failure to meet minimal due process requirements.

There exists additional precedent for the proposition that right to a hearing compatible with due process standards is strongly rooted in Nebraska state law, although in the civil context. *Doremus v. Farrell,* 407 F. Supp. 509 (U.S.D.C. Neb. 1975); *The Nebraska Mental Health Commitment Act Neb. Rev. Stats.* §§83-1001-1078.

The state argues that the mere existence of *Neb. Rev. Stat.* §83-180(1) and its questionable transfer procedures gives a prisoner an expectation that he will be transferred according to its stated procedures. The mere reading of the procedures outlined in the statutes does not leave open the possibility of constitutional challenge to the procedural aspects of the statute, once it has raised expectation in the prisoner that he will not be transferred unless mentally ill. The mere existence of *Neb. Rev. Stat.* §83-180(1) would seem to indicate that the transfer to a state mental hospital, because of the tremendous liberty interest involved, requires closer scrutiny. Otherwise, why would not the state effectuate such transfers pursuant to *Neb. Rev. Stat.* §83-176 (Reissue 1976)?

The limited holding reached in *Meachum* was based in part on the decision of this Court not to place the Due Process Clause ". . . astride the day to day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Meachum, supra,* p. 228, 229. It is our contention that an involuntary transfer to a state mental hospital is not merely an administrative matter nor a discretionary de-

cision, regardless of the fact that a physician or psychologist may make the decision. This Court in the case of *Baxstrom v. Herold*, 383 U.S. 107 (1966) stated that such transfers could not be categorized simply as administrative transfers:

> . . . This statutory classification cannot be justified by the contention that Dannemora [state hospital] is substantially similar to other mental hospitals in the state, and that commitment to one hospital or another is simply an administrative matter affecting no fundamental rights. . . . *Baxstrom, supra*, p. 113.

Other courts have recognized that the differences in the two types of incarceration (prison-mental hospital) ". . . are simply too great to treat the transfer to a mental hospital as a routine administrative procedure. The consequences of a mistake are sufficiently great to warrant giving prisoners the same protection as non-prisoners receive. . ." *Matthews v. Hardy*, 420 F.2d. 607, 611 (1969).

Perhaps the most significant reason why transfers from a penitentiary to a mental hospital involve a great deal more than a normal prison administrative transfer is that an individual mistakenly placed in a mental hospital may suffer severe emotional or psychic harm. The common use of chemotherapy in mental hospitals can contribute to the disturbing possibility that one mistakenly confined in a mental institution may actually become mentally ill. Mental patients are forced to endure added frustration, hardships and restrictions to which typical prisoners are not exposed (R. 80-99). See also *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071 (2nd Cir. 1969).

In *Chesney v. Adams*, 377 F.Supp. 887 (1974) a prisoner challenged the constitutionality of the procedure used to transfer him from the Connecticut Correctional Institution to the Security Treatment Center, contending that the state in

question allowed for his transfer without a hearing, which was afforded to non-prisoners. The court in finding the state statute unconstitutional noted that the disparity in procedural safeguards afforded prisoners relevant to the smooth functioning of the prison or discipline of prisoners does not allow for justification for labeling such a transfer an administrative matter. *Chesney, supra*, p. 894.

The court below took note of the greater limitations of freedom of action at the Lincoln Regional Center, the fact that a transfer there has stigmatizing consequences and that the use of mandatory behavior modification technique all combine to make a transfer there tantamount to a major change in the condition of confinement amounting to a grievous loss. (Memorandum Opinion, Jurisdictional Statement, App. 8)

The state has argued that the prisoner failed to prove that the statute (§83-180) was not followed and that any right by virtue of the statute was given to the prisoner. The initial complaints filed by the plaintiffs and intervenors clearly indicate that we agree that the statutory procedure for transfer was followed, but challenge its constitutionality on its face and as applied. (App. 7, 8, 12, 13, 18, 19, 21, 22, 23).

This Court has held that due process attaches in a number of cases which have been cited in the brief of the state: *Morrissey v. Brewer*, 408 U.S. 471 (parole); *Gagnon v. Scarpelli*, 411 U.S. 778 (probation); *Wolff v. McDonnell*, 418 U.S. 539 (good time). These cases deal generally with grants of liberty which were affirmatively conferred by state law. Common sense would seem to dictate that the freedom from being involuntarily placed in a mental institution is a much more *fundamental* liberty than loss of good time, probation or parole. Even though the loss of one's parole may cause the interruption of one's life, one is free to be paroled

again. Even though one may lose his preferred status of probation, he may once again regain it, as in the case of good time. But once someone is transferred involuntarily to a state mental hospital, the stigma does not leave. Nor do the affects, or side affects, of chemotherapy necessarily leave once the individual is free again. And one mistakenly labelled mentally ill, who remains so confined for a long duration, may actually become mentally ill. And certainly transfer to a mental hospital involves more of a loss of liberty than transfer to maximum security and solitary confinement. See *Wolff, supra,* at 571-72 n. 19; *Enomoto v. Wright,* Aff. w/o opinion 1978, 434 U.S. 1052 (1978).

The court below, having realized that a substantial "liberty interest" was involved, chose to use the analytical framework set out by this Court in the case of *Matthews v. Eldridge,* 424 U.S. 319, 334, 335 (1976) which suggested:

> [O]ur prior decisions indicate that identification of the specific interest dictates of due process gnerally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest including the function involved and the fiscal and administration burdens that the additional or substitute procedural requirements would entail. See, *e.g., Goldberg v. Kelly, supra* at 263-271. See also (Memorandum of Decision, Jurisdictional Statement, App. 8).

The first factor, the private interest of not being transferred to a state mental hospital, is different from the interests in *Meachum, Montanye,* or *Wolff.* Here the prisoner has greater private interest because of the stigmatizing affects of

being placed with the mentally ill and being labelled mentally ill. Also, the interest is greater because the prisoner, after the transfer, may be subject to the behavior modification programs which include the use of chemotherapy.

Secondly, the risk of an erroneous deprivation of the private interest was found by the lower court to be high, since the statute allows transfer of the prisoner based on the opinion of only one physician or psychologist. This is the only safeguard, and the transferee often is unable to challenge or understand the conclusions of the physician. The risk may be even higher when a prisoner is transferred on the opinion of a medical physician who may not even have training in psychology or psychiatry. The record of the proceedings below indicates that an even higher risk may be involved as oftentimes there is a delay in the return of the prisoner to the Penal Complex after he has been treated and cured at the Regional Center (R. 172-173). In the case of intervenor William George Foote the delay was four weeks (R. 173).

In evaluating the state's interest the lower court found:

> Swiftness does not appear to be a major need in view of the availability at the Penal Complex of physical security, some psychiatric and psychological staff and a hospital. Hazards of calling witnesses at a hearing either within or outside the Penal Complex, whether those witnesses are prisoners or non-prisoners, are certainly less when the issue is whether the inmate is mentally ill than when the issue is whether the inmate has committed some infraction for which he should be disciplined. Usually, the witnesses in a mental hearing will be nonprisoners. (Memorandum of Decision, Jurisdictional Statement, App. 9, 10,)

Additionally, the state failed to make a showing of how additional procedures prior to involuntary transfer mandated

by the court below would create an additional administrative or fiscal burden. The record is totally absent on this point.

As a practical matter there are probably relatively few individuals who contest their transfers. The Department of Correctional Services in Nebraska could use its hearing officer which it hired to conduct parole revocation hearings after this Court's decision in *Wolff, supra.* It would, therefore, seem that no additional burden is or has been placed on the state because of the mandate of the lower court.

II.

A PRISONER HAS A PROTECTED LIBERTY INTEREST IN THE AVOIDANCE OF BEING STIGMATIZED MENTALLY ILL AND SUBJECTED TO CHEMOTHERAPY AND BEHAVIOR MODIFICATION PROGRAMS.

The fourteenth amendment prohibits any state from depriving a person of life, liberty, or property without due process of law. The state has attempted to define "liberty" as only those rights which the state chooses to grant. If this were the case, the only objective expectation that a prisoner would have in not being arbitrarily transferred to a mental institution would be that which the state arbitrarily chooses to give to him. This is a rather jaundiced approach to the common understanding of the concept of liberty in a non-totalitarian state. We contend that even though a prisoner may give up some liberty when he is incarcerated pursuant to a valid conviction, an individual does possess a residuum of constitutionally protected liberty. Mr. Justice Stevens in the dissent of *Meachum* in his discussion of *Morrissey v.*

Brewer, 408 U.S. 471, aptly characterized this concept:

> . . . For if an inmate's protected liberty interests are no greater than the State chooses to allow, he is really no more than the slave described in the Nineteenth Century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore. *Meachum, supra,* p. 233.

See Also, Manoghan, *Of "Liberty" and "Property",* 62 Cornell L. Rev. (1977); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Proces in the Administrative State,* 62 Cornell L. Rev. 445 (1977); *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 86-104 (1976)

To carry the state's argument to its logical absurdity, by virtue of *Neb. Rev. Stats.* § §83-176-180, the Director of Correctional Services may place an inmate anywhere he wishes and for however long he wishes. If the Department of Public Institutions happens to operate a mental hospital using electroshock therapy or homes for the retarded, an inmate has no liberty interest whatsoever in not being transferred there. And the Constitution of the United States affords him no protection, because the statutory scheme has created no justifiable expectation that he will not be so transferred. Rather, a prisoner has a constitutionally protected liberty interest in the avoidance of transfer to a mental hospital regardless of where he was transferred from. This Court has recently noted in the case of *O'Connor v. Donaldson,* 422 U.S. 579 (Burger, concurring opinion):

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. *Specht v. Patterson,* 386 U.S. 605, 608, 87 S.

> Ct. 1209, 1211, 18 L. Ed. 2d. 326 (1967). *In Re Gault,* 387 U.S. 1, 12-13, 87 S. Ct. 1428, 1435-1436, 18 L. Ed. 2d. 527 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. . . .

This Court in the case of *Baxstrom v. Herold,* 383 U.S. 107, dealt with a situation in which a prisoner nearing the end of his prison term was committed to a mental hospital, but under a New York statute did not have the option of jury review on the issue of insanity, which all other persons civilly committed possessed. The Court invalidated the procedure, using an equal protection analysis. The case clearly stands for the proposition that when a state establishes mental health commitment review procedures, it may not, consistent with the fourteenth amendment, arbitrarily withhold it from a class of people. Although the case was decided on equal protection grounds, the Court would not have so found unless there existed a fundamental constitutionally protected liberty, that the prisoner Baxstrom possessed in not being involuntarily committed to a mental hospital.

Lower courts have followed the *Baxstrom* decision that a non-prisoner has a liberty interest in not being involuntarily transferred to a state mental hospital. In the case of *United States ex rel. Schuster v. Herold,* 410 F.2d. 1071 (2nd Cir. 1969) a factual situation existed almost identical to the case at hand, as a prisoner was transferred to a state mental hospital, which was more restrictive than the prison. Also using an equal protection analysis, the court determined that a classification scheme existed, and that there was no rational basis behind the scheme for treating prisoners differently. The court held that before a prisoner may be transferred to the state mental hospital he was entitled to the

same procedures as those afforded to non-prisoners when they are involuntarily transferred to a mental hospital. *Schuster, supra,* p. 1084. The court would not have so held had they not felt that a liberty interest was retained by prisoners and non-prisoners alike. The court focused on the severe restrictions placed on the criminally insane and indicated that such transfers were not merely administrative matters. *Schuster, supra,* p. 1078. Even more important, the court recognized the dangers to such transfers when minimal procedural rights are afforded:

> In considering the problem posed, we are faced with the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad, but dangerously so, . . . Confined with those who are insane, told repeatedly that he too is insane, and indeed treated as insane, it does not take much for a man to question his own sanity and in the end sucumb to some mental aberration. *Schuster, supra,* p. 1078.

The court in *Schuster* as in the case of *Matthews v. Hardy,* 420 F.2d. 607 (1969) focused upon the fact that a stigma is attached to the mentally ill which is different from that attached to the criminal class in general. The court in *Chesney v. Adams,* 377 F. Supp. 887, 893 (D. Conn. 1974) in a substantially similar case relying upon *Matthews* and *Schuster* pointed out that a mental hospital commitment can have great effects on ". . . job possibilities and personal associations." Even if a prisoner is released after a short period of time, for what is commonly referred to as "evaluation and treatment," the damage done may be the stigma imprinted, regardless of the duration of the confinement. Additionally, a mental health commitment on one's record may result in:

. . . State constitutional and statutory restrictions on voting rights; restrictions on one's right to serve on a federal jury; restrictions on one's ability to obtain a driver's license; and limitations on his access to a gun license. Moreover, it is still commonly held that an adjudication of mental incompetency gives rise to a rebuttable presumption of continued incompetency. In many jurisdictions such a presumption may in turn affect the right to dispose of property, to execute contracts and to perform many similar and commonplace functions. Indeed, such an adjudication, while not always crippling, is certainly always an ominous presence in any interaction between the individual and the legal system. Such evidence will frequently be revived to attack the capacity of a trial witness. Depending upon the diagnosis, it may be admissible for impeachment purposes. Indeed, even in a criminal trial, it may be available to attack the character of a defendant, if he has put his character in issue. Most significantly, records of commitments to a mental hospital will certainly be used in any subsequent proceedings for civil commitment. *In Re Ballay,* 482 F.2d. 648, 651, 652 (D.C. Cir. 1973)

In the recent case of *Addington v. Texas,* 60 L.Ed. 323 2d. (1979) this court held that an individual's interest in the outcome of a civil commitment proceeding is of such weight that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence. *Id.* at 332

This court recognized that involuntary commitment to a mental hospital has a lasting, significant impact on an individual.

. . . it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this

phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual. *Id.* at 330.

The court below properly recognized that a transfer to the Lincoln Regional Center results in greater limitations on freedom of action, has stigmatizing consequences, and that coupled with mandatory behavior modification, results in a major change of confinement tantamount to a grievous loss (Memorandum of Decision, Jurisdictional Statement, App. 8)

The patients at the Lincoln Regional Center are not allowed to keep the following items in their cells:

1. Matches (R. 41)
2. Cigarettes (R. 82)
3. Cigarette lighters (R. 82)
4. Shaving razors (R. 82)
5. Nail clippers (R. 82)
6. Magazines (R. 42) (S-5 only)
7. Shoes (R. 83, 42-43) (S-5 only)
8. Stereos (R. 43)
9. Radios (R. 43)
10. Televisions (R. 43)
11. Food (R. 82)
12. Books (R. 43, 83, 94-95)
13. Pen (R. 83)
14. Pencils (R. 83)
15. Writing paraphernalia (R. 43)
16. Glass articles (R. 43)
17. Gum (R. 41, 42, 82)
18. Belt (R. 83)
19. Musical instruments (R. 137)
20. Painting materials (R. 96)

21. Ash trays (R. 43)

These articles may be kept by prisoners in their cells at the Nebraska Penal and Correctional Complex (R. 12, 13, 14, 83, 132).

Most of the articles may not be carried by the patients on their person at the Lincoln Regional Center Security Building, while the same prohibition does not exist at the Nebraska Penal and Correctional Complex (R. 17, 18, 20, 21, 44, 82, 83).

At the Lincoln Regional Center Security Building the patients suffer the following additional losses of freedom which are not denied the inmates at the Nebraska Penal and Correctional Complex:

A. Must be accompanied by guards or security technicians when they leave the ward.
B. Are allowed only four sets of clothing
C. Are not allowed to earn money by working on the ward.
D. Are not eligible for work-release programs.
E. Are not eligible for work-training programs, including carpentry, welding, drafting, metal manufacturing, automative body repair, and other vocational skills.
F. Are forced to take afternoon naps.
G. Are not allowed daily access to the gym, weight-rooms, and the outdoors.
H. Are sometimes punished by means of leg, waist, and bed restraints.
I. Are punished for aggressive behavior by being given drugs to subdue them.
J. May not chew gum.
K. Are subject to time restrictions for smoking.
L. Are forced to do unpaid ward work in addition to mopping, sweeping, and buffing the floors and halls.

M. Are limited in the number of organized sports.
N. Have a definite time at which they must go to bed.
O. Are given virtually no outside entertainment.
P. Are not allowed to keep or play instruments in their rooms, form bands, or listen to those who have formed bands.
Q. Are not allowed to paint in their rooms or to have access to an art club and an art display where they might sell their artwork.
R. Have their silverware individually counted, handed to them, and individually taken away from them at mealtime.
S. Have no access to high school equivalency courses, correspondence courses, or educational-release programs at local universities.
T. Are not allowed access to a law library.

(R. 11-24, 38-52, 80-99, 128-140).

The record clearly indicates that treatment and confinement at the Lincoln Regional Center Security Building is much more restrictive than the confinement at the Nebraska Penal and Correctional Complex. The obvious reason for the differences is that the Lincoln Regional Center is a mental hospital employing a restrictive behavior modification program, and the Nebraska Penal and Correctional Complex is a prison facility which is designed to confine prisoners, not treat mental illness.

The most important difference between the two institutions is the fact that inmates at the Penal Complex are not forced to take medication and chemotherapy, while the same is mandatory at the Lincoln Regional Center Security Building (R. 79, 80, 128, 129). For this reason standing alone, this Court should find that a prisoner has a "liberty interest" for which he must be afforded due process before

transfer to a state mental hospital. The common use of chemotherapy on prisoners for even a short period of time may have unknown side effects and may in effect contribute significantly to the possibility that one mistakenly confined may become mentally ill. The lower court was correct in finding that the risk of an erroneous deprivation of the prisoners' private interests was high, considering the minimal safeguards afforded by *Neb. Rev. Stat.* §83-180(1) (Reissue 1976).

The state has argued that the responsibility for the determination of the need for psychiatric care is properly placed with the health care professionals alone. They have sought to characterize the lower court's decision as one which takes away the decision from health care professionals and gives it to the attorneys and judges. The state has failed to point out that the procedural safeguards set down by the court below contemplate a hearing in which the testimony of health care professionals will be heard. The safeguards allow the prisoner the opportunity to call independent mental health professionals, who may agree or disagree with those called by the state. Although the independent decisionmaker himself may not be a health care professional, his decision will surely be based on the testimony of other health care professionals, whose creditibility will be weighed by the trier of fact. This Court in *O'Connor v. Donaldson*, 422 U.S. 563, 579 (1975) (Burger, concurring) noted:

> The Court appropriately takes notice of the uncertainties of psychiatric diagnosis and therapy, and the reported cases are complete with evidence of the divergence of medical opinion in this vexing area. *E.g. Greenwood v. United States*, 350 U.S. 366, 375....See also *Drope v. Missouri*, 420 U.S. 162 . . . (1975).

See also, Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974). *Addington v. Texas, Supra* at 333, 4.

Under the statute held unconstitutional by the court below, the transfer of a prisoner may be made to a mental hospital on the testimony of a physician alone, who has had no psychiatric training.

The appellants have sought to characterize the transfer of a prisoner to a state mental hospital as no different from a transfer to a medical hospital. Obviously, there is a grave difference. The prisoner sent to a hospital has a right to refuse the treatment if for no other reason than religious beliefs. Rarely would a prisoner refuse such medical treatment as many lawsuits are brought in state and federal courts seeking to force state prison officials to provide adequate medical care. If a prisoner is sent to a hospital for an operation and is returned to the prison population, this carries no stigma whatsoever. On the other hand, transfer to a state mental hospital carries with it a definite stigma. Some prisoners may not like being placed with and forced to associate with those that suffer from mental defects. In an open ward, as was characterized in the case before us, it may be substantially more dangerous than the normal prison environment. There might also be a presumption that a patient is mentally ill if his sentence expires and he is still confined at the Lincoln Regional Center, which might induce a local prosecutor to bring him before a mental health commitment board. The parole board, looking to his history of confinement in the mental hospital, might be less apt to release him to society. None of these factors, particularly the stigmatizing of the inmate, exists when he seeks and receives medical treatment.

The state has cited and quoted from two sets of Standards for correctional institutions, those of the National Advisory Commission on Criminal Justice (1973) and the Com-

mission on Accreditation for Corrections of the American Correctional Association (1977). These Standards are quoted and discussed to support three propositions: (1) That prison inmates should receive treatment for mental and emotional problems; (2) That these inmates should be transferred to the appropriate facilities where such treatment is available; and (3) That the determination of the need for such transfers should be made by health care professionals.

The Appellee does not in any way disagree with these policies or with the Standards quoted by the state. A prison inmate suffering from mental illness should be provided with treatment at an appropriate facility, and the determination as to their illness should be made by qualified mental health professionals. The Court should note, however, that the state has failed to quote a number of additional Standards which must be read with those that *were* quoted in order to provide the complete scheme contemplated by the Advisory Commission.

Standard 2.13, Procedures for Nondisciplinary Changes in Status of the National Advisory Commission on Criminal Justice, is as follows:

> Each correctional agency should immediately promulgate *written rules and regulations* to prescribe the procedures for determining and changing offender status, including classifications, *transfers,* and major changes or decisions on participation in treatment, education, and work programs within the same facility.
>
> 1. The regulations should:
>
> a. Specify criteria for the several classifications to which offenders may be assigned and the privileges and duties of persons in each class.
>
> b. Specify frequency of status reviews or the nature of events that prompt such review.

> c. Be made available to offenders who may be affected by them.
>
> d. Provide for notice to the offender when his status is being reviewed.
>
> e. Provide for participation of the offender in decisions affecting his program.
>
> 2. The offender should be permitted to make his views known regarding the classification, transfer, or program decision under consideration. The offender should have an opportunity to oppose or support proposed changes in status or to initiate a review of his status.
>
> 3. Where reviews involving substantially adverse changes in degree, type, location, or level of custody are conducted, an *administrative hearing should be held,* involving notice to the offender, an opportunity to be heard, and a written report by the correctional authority communicating the final outcome of the review. Where such actions, particularly transfers, must be made on an emergency basis, this procedure should be followed subsequent to the action. *In the case of transfers between correctional and mental institutions, whether or not maintained by the correctional authority, such procedures should include specified procedural safeguards available for new or initial commitments to the general population of such institutions.*
>
> 4. Proceedings for nondisciplinary changes of status should not be used to impose disciplinary sanctions or otherwise punish offenders for violations of rules of conduct or other misbehavior.
>
> (Emphasis added.)

Similarly, Standard 16.12, Commitment Legislation, provides:

Each state should enact. . . legislation governing the commitment, classification, and transfer of offenders sentenced to confinement. Such legislation should include:

5. Authorization for the transfer of offenders in need of specialized treatment to institutions that can provide it. This should include offenders suffering from physical defects or diseases, mental problems, narcotic addiction, or alcoholism.
7. *A requirement that the correctional agency develop through rules and regulations (a) criteria for the assignment of an offender to a particular facility and (b) a procedure allowing the offender to participate in and seek administrative review of decisions affecting his assignment or transfer to a particular facility or program.*

(Emphasis added.)

The Commentary following Standard 2.13 discusses the fact that transfers of the type involved in the case at hand may have serious effects upon a prison inmate's degree of liberty, access to correctional services, and the conditions of existence within the correctional system. The drafters cite *Baxstrom v. Herold,* 383 U.S. 107 (1966) and *U.S. ex rel. Schuster v. Herold,* 410 F.2d 1071 (2d Cir. 1969) to point out that the Courts *have* required procedural protections when inmates are transferred from prisons to mental hospitals. They express the view that the procedures outlined in their Standards must be complied with in order to prevent correctional agencies from exercising their discretionary powers in an arbitrary or capricious manner, as was possible pursuant to *Neb. Rev. Stat.* §83-180 (Reissue 1976).

Standard[s] [2;13] speak[s] to the discretionary power

which correctional agencies exercise over offenders and how that power is to be regulated and controlled. No system of individualized treatment can avoid discretionary power over those to be treated, but such power must be controlled in order to avoid arbitrary and capricious action. National Advisory Commission at 22.

A thorough and complete reading of the Advisory Commission's report indicates, therefore, that the experts in the correctional field have recognized the need for due process guarantees to be afforded a penitentiary inmate facing possible mental hospital commitment. The sections herein quoted make it clear that the drafters of the Standards were aware of the necessity of providing the same rights to persons facing mental hospital commitment from a penitentiary as those civily committed.

Interpretation of these Standards obviously does not suggest that a due process hearing prior to transfer is inappropriate or futile. Mental hospital commitment is by no means analagous to brain surgery. The distinctive stigma attached to mental illness has been recognized by the courts and its existence mandates that process is due.

III.

AN INMATE WHO IS TO BE INVOLUNTARILY TRANSFERRED TO A STATE MENTAL HOSPITAL MUST BE AFFORDED THE RIGHT TO COUNSEL IN ADDITION TO OTHER MINIMAL REQUIREMENTS OF DUE PROCESS.

The court below correctly held that availability of legal counsel, furnished by the state if the inmate is financially unable, must be afforded an inmate at a hearing on the issue of the necessity of his transfer to a mental hospital (Memorandum Opinion, Jurisdictional Statement, App. 12, 13).

The court stated:

> The availability of counsel is as critical to a prisoner who may be mentally ill as it is to a non-prisoner in the same condition. The capability to examine, understand, evaluate, and challenge the process and the evidence is vital and there may be nobody available to do so, unless it be by counsel, furnished by the State if need be, because of indigency. The State's interest in avoiding hearings having an adversary cast which may tend to obstruct achievement of correctional goals recognized in *Wolff v. McDonnell*, 418 U.S. at 567-570, are overshadowed by the disability which accompanies one who is mentally ill. It should be apparent that the prisoner's rights are largely illusionary, unless he knows those rights. (Memorandum Opinion, Jurisdictional Statement, App. 12, 13).

The court's reasoning is quite sound as it recognized the uniqueness of the disabilities which accompany the mentally ill. Additionally, oftentimes an inmate suffering mental illness who is to be involuntarily transferred will have already been placed on medication. If he is afforded all of the minimal requirements of due process set out in *Morrissey v. Brewer*, 408 U.S. 471 (1972), but not the availability of counsel, who will guarantee for him that he attends his hearing non-medicated? What purpose does it serve to grant minimal due process guarantees if the transferee cannot remember the hearing because he was overmedicated? Who will prevent the state from overmedicating each inmate who

wishes to contest his transfer to the state mental hospital? An overmedicated or medicated inmate may appear mentally ill to an independent decisionmaker, who may not be able to properly judge the affects unless presented to him by counsel.

How will an unrepresented inmate know that he is able to have an independent psychiatric evaluation unless told to him by counsel? An unrepresented prisoner might rely on the single diagnosis of the treating physician and psychologist, not realizing the uncertainties of psychiatric diagnosis.

In the case of *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wisc. 1972) the court found Wisconsin's civil commitment procedure unconstitutional, and required persons to be committed be given the opportunity for representation by counsel. The court based its holding on the reasoning used in *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968) in which the court compared the situation of a mental deficient to the juvenile delinquency procedure involved in *In Re Gault*, 387 U.S. 1, (1967):

> [L]ike *Gault*, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. *It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency.* It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to . . . see that a subject of an involuntary commitment proceedings is afforded the opportunity to [have] the guiding hand of legal counsel at every step of the

proceedings, unless effectively waived by one authorized to act in his behalf.... *Heryford, supra* at 396. (Emphasis added.)

The court below properly found that the additional requirement of legal counsel is especially needed in the unique situation of transfer to a state mental hospital, because of the tremendous liberty interest involved.

Civil committees are afforded the right to counsel pursuant to *Neb. Rev. Stats.* §§83-1001-1078 in the State of Nebraska. Those who are to be criminally committed are in the same need of counsel to help cope with the problems and complexities of the law.

Equal Protection Considerations

The court below found that *Neb. Rev. Stat.* §83-108(1) (Reissue 1976) was unconstitutional because of due process infirmities, and did not expressly decide whether or not the procedure was constitutionally infirm using an equal protection analysis. We would agree with the court below that under an equal protection analysis the constitutional question of treating prisoners and non-prisoners in a different manner would depend upon a weighing of the factors discussed in the opinion below.

It is our contention, although not expressly reviewable by this Court, that the same result could have been reached by an equal protection analysis. We disagree with the state's attempt to distinguish *Baxstrom v. Herold*, 383 U.S. 107 (1966). *Baxstrom* clearly stands for the proposition that when a state establishes mental health commitment review procedures, it may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from a class of people. The only factual distinction is that the

plaintiff in *Baxstrom*, already having completed his prison sentence, was challenging his mental health commitment at its expiration, while the plaintiff here challenged his commitment at its inception. Lower courts have followed the analysis in *Baxstrom*, using an equal protection analysis in cases involving nearly identical factual situations to the case at hand. See *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071 (2nd Cir. 1969); *Chesney v. Adams*, 377 F. Supp. 887 (D. Conn. 1974); *Matthews v. Hardy*, 420 F.2d. 607 (1969).

Should this Court wish to find the statute in question unconstitutional using an equal protection analysis, we would contend that the present procedures for civil commitments, *Neb. Rev. Stats.* §§83-1001-1078, do not present an insurmountable hurdle for comparison purposes, because of their enactment after the plaintiff's transfer. Their effective date, April 6, 1976, was still prior to the decision rendered by the lower court on September 12, 1977.

CONCLUSION

The appellee respectfully moves the Court to affirm the judgment entered in this cause by the United States District Court for the District of Nebraska.

Respectfully submitted,

/s/ THOMAS A. WURTZ
101 E. Broadway
Suite 303
Eugene, Oregon 97401
Court-appointed Attorney for Appellee Larry D. Jones.